TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 208.

ADOLPHUS DURANT, APPELLANT,

vs.

CHARLES S. STORROW, EDWARD S. RAND, THE ESSEX COMPANY, JOHN A. BUTTRICK, JAMES K. FELLOWS, AND CHARLES P. TALBOT, EXECUTORS OF JOHN NESMITH, DECEASED, CALEB SAUNDERS, ADMINISTRATOR OF DANIEL SAUNDERS, DECEASED, AND SAMUEL LAWRENCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 3, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 208.

ADOLPHUS DURANT, APPELLANT,

vs.

CHARLES S. STORROW, EDWARD S. RAND, THE ESSEX COMPANY, JOHN A. BUTTRICK, JAMES K. FELLOWS, AND CHARLES P. TALBOT, EXECUTORS OF JOHN NESMITH, DECEASED, CALEB SAUNDERS, ADMINISTRATOR OF DANIEL SAUNDERS, DECEASED, AND SAMUEL LAWRENCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Bill of complaint	3	1
Plea in bar of Essex Company *et al*	11	5
Exhibit A, annexed to above plea in bar	31	18
Answer of Essex Company *et al*	44	22
Plea in bar of Samuel Lawrence	48	25
Answer of Samuel Lawrence	49	25
Motion to dismiss petition	50	26
Decree of circuit court	51	27
Opinion of circuit court	52	27
Certificate of clerk of circuit court	56	29
Copy of bond to party on appeal	57	29
Citation and acknowledgment of service	58	30

SUPREME COURT OF THE UNITED STATES.

No. 208.

ADOLPHUS DURANT, APPELLANT,

vs.

CHARLES S. STORROW, EDWARD S. RAND, THE ESSEX COMPANY, JOHN A. BUTTRICK, JAMES K. FELLOWS, AND CHARLES P. TALBOT, EXECUTORS OF JOHN NESMITH, DECEASED, CALEB SAUNDERS, ADMINISTRATOR OF DANIEL SAUNDERS, DECEASED, AND SAMUEL LAWRENCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Bill of complaint	3	1
Plea in bar of Essex Company *et al*	11	5
Exhibit A, annexed to above plea in bar	31	18
Answer of Essex Company *et al*	44	22
Plea in bar of Samuel Lawrence	48	25
Answer of Samuel Lawrence	49	25
Motion to dismiss petition	50	26
Decree of circuit court	51	27
Opinion of circuit court	52	27
Certificate of clerk of circuit court	56	29
Copy of bond to party on appeal	57	29
Citation and acknowledgment of service	58	30

1 UNITED STATES OF AMERICA,
District of Massachusetts:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-six, before the honorable Nathan Clifford, associate justice.

ADOLPHUS DURANT, PETITIONER,
v.
THE ESSEX COMPANY ET AL., DEFENDANTS. } In equity.

The bill of complaint in this cause was filed in the clerk's office on the twenty-ninth day of June, A. D. 1874, and was duly entered at
2 the May term of this court, A. D. 1874, and is in the words and figures following, namely:

3 *Bill of complaint.*

The petition of Adolphus Durant, of Salem, in the county of Rockingham, in the State of New Hampshire, and a citizen of said State, against Charles S. Storrow and Edward S. Rand, both of Boston, in the county of Suffolk, the Essex Company, a corporation duly established under the laws of the commonwealth of Massachusetts, and having its usual place of business in said Boston, John A. Buttrick, James K. Fellows, and Charles P. Talbot, of Lowell, executors under the will of John Nesmith, late of Lowell, in the county of Middlesex, deceased, and Caleb Saunders, of Lawrence, administrator of the estate of Daniel Saunders, late of Lawrence, in the county of Essex, deceased, all of said commonwealth, and citizens thereof, and Samuel Lawrence, of the city, county, and State of New York.

Your petitioner represents that on or about the eleventh day of October, A. D. 1847, he filed, upon the equity side of this honorable court, against the above named parties and those whom they represent, the bill of complaint set forth in the annexed transcript of the record, and caused the said respondents to be duly summoned to an-
4 swer the same and abide the decree to be rendered therein. That such proceedings were taken and had in said cause; that the respondents therein answered, as in and by said transcript of record will appear; and the same was thereupon dismissed as to Stephen Barker and Daniel Saunders, junior, then respondents therein, and as to the others, the complainant filed his replications, and proofs were taken upon the issues thus formed; and the cause came on to be heard before this honorable court in the May term thereof for the year A. D. 1855.

That on or about the seventh day of June, A. D. 1855, the court did decree that the said respondents, Lawrence, Saunders, and Nesmith, were liable to the complainant in and for certain moneys, the amount of which should be thereafter ascertained, and that said bill should be dismissed as to the said Rand, Storrow, and the said Essex Company; that upon the complainant declining to accept the relief so decreed to him, the said bill was, on or about the third day of September, A. D. 1855, dismissed as to said Lawrence, Saunders, and Nesmith without costs.

That the complainant appealed from said decree to the Supreme Court of the United States then next to be holden at Washington.

That said cause came on to be and was heard before said Supreme Court at the term thereof commenced and holden at Washington on the first Monday of December, A. D. 1856. And the said court (six of the judges thereof being present), being unable to agree as to the form of relief to which the complainant was entitled, ordered a further or second argument thereof to be had at the next succeeding term thereof.

That in pursuance of said order said cause was for the second time heard by said court (eight of the judges thereof being present) at the term thereof holden on the first Monday in December, A. D. 1857. And the said court, being unable to agree upon the relief to which said complainant was entitled, ordered, adjudged, and decreed in the words following, to wit:

5 "That the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs." "By a divided court."

That upon filing the mandate issued upon said decree of the said Supreme Court in this court at the October term thereof, A. D. 1857, viz, on the fourth day of said May, 1858, the complainant's counsel moved the court that he might have leave to discontinue his bill, or that the court would decree that the same might be dismissed without prejudice, which said motion was denied; and the said court then decreed that said bill be dismissed, and that execution issue against this complainant and in favor of all of said respondents for their costs accrued in said Supreme Court, and for and in favor of Rand, Storrow, and the Essex Company, for their costs in said circuit court. And the said decree has since been duly signed and entered of record, and the said executions for said costs have since been duly issued, and by this complainant paid.

And your petitioner further shows that since the making and recording of said decree new matters and things material and important to his rights in the subject of said suit have arisen, and been made apparent to, and discovered by him, particularly the following, that is to say:

First. In June, in the year 1847, the said Essex Company, in the supreme judicial court for the commonwealth of Massachusetts, did bring its writ against your petitioner to recover the possession of the said premises mentioned in said bill. To which suit your petitioner pleaded that he had not disseized the said company. Said cause came on for trial at the November term of said court in the year 1858, and after the rendering and recording of said decree in the circuit court as aforesaid, at which trial the said company claimed title under and by virtue of the deed of this petitioner to Sargeant, and by sundry mesne conveyances, also by virtue of a deed from one Jacob Howe, assignee of your petitioner in insolvency, to one Foster, and by sundry mesne conveyances. And your petitioner, being advised by his counselors learned in the law that said decree, in the said suit in the circuit court, having been made under a mandate issued by the appellate court, divided in opinion, could not have, and did not have the force and effect of, and was not in fact a judgment upon the merits of his case, undertook to prove in defence to said writ of entry the facts and matters alleged and proved in the suit in equity; but the said supreme judicial court decided that the defence thus made by your petitioner was insufficient in a suit at law, and that the same could only be urged in a court of equity, where matters of that and like nature are cogniza-

ble and relievable, and rendered a judgment against your petitioner, and did issue its writ directing the sheriff to put the said Essex Company in possession of said premises, and to collect of this petitioner the costs; which said writ was by the said sheriff executed and possession of said premises given to the said Essex Company, and the said costs were duly collected.

Second. That acting upon the advice of counsel, and in the belief hereinbefore stated, that the said decree of the circuit court had not the force and effect of and was not a judgment upon the merits of his cause, and could not be pleaded in bar to a suit brought in a proper manner and before a proper tribunal; and, influenced in part by the opinion of the court given in the said suit by said Essex Company for possession of said premises, your petitioner did, on the equity side of the said supreme judicial court for said commonwealth of Massachusetts, at the November term thereof, A. D. 1861, bring his bill of complaint against the said Essex Company, complaining and praying substantially as in and by the said bill first in this petition named was complained and prayed.

That said company being duly served with process appeared and answered said bill by plea and accompanying answer, in which said company did plead in bar the said decree or judgment of the said circuit court.

And the said supreme judicial court did adjudge said plea sufficient and did pronounce that the record in said suit had all the elements of a final decree, and was a bar to the complainant's said bill, and dismissed the same with costs; all of which appears of record and will be duly proved when demanded.

7 Third. That your petitioner, conscious that he had through the fraudulent practices of the respondents been grievously wronged out of a valuable estate, again sought the advice of counsel, and was by them advised and did believe that said decree of the circuit court ought not to have, and had not, the force of a final judgment upon the merits of his cause, and could not lawfully be pleaded in bar, or adjudicated to be a bar to any proper proceeding instituted in a tribunal having cognizance of matters like those complained of in his said bill.

And your petitioner did, under the advice of learned and scrupulous counselors of this court, bring his second bill of complaint to the equity side of this court in April, 1865, against the said Essex Company, wherein he stated substantially the same facts as in his first bill in this court had been stated; and further charged that the said company held said property and estate upon the express trust to account to your petitioner for the fair market value thereof, when the title to the same became perfected, and praying relief. To which bill the said Essex Company, having been duly summoned, appeared, and for answer pleaded in bar the said decee of the circuit court hereinbefore first named; and the judgment of the supreme judicial court for the commonwealth of Massachusetts in the said suit for possession, and the said decree of said last-named court in the suit on the equity side thereof hereinbefore named, and the statute of limitations of the commonwealth of Massachusetts, and that complainant had been guilty of laches, and accompanied said pleas with an answer in support thereof, purporting to be in pursuance of the rules of this court in such case made and provided. Said cause came on to be heard upon the said pleadings at the May term of this court, A. D. 1866; and thereupon the court sustained said first plea in bar, and by its decree dismissed said bill with costs; from which decree your petitioner appealed to the Supreme Court of the United States then next to be holden at Washington, on the first Monday of December, A.

D. 1866; that said cause came on to be heard before said Supreme Court at the term thereof holden on the first Monday of December, A. D. 1868, and the same was heard on or about the twentieth day of February, A. D. 1869, and it was thereupon decided by said court
8 that the decree of the circuit court first hereinbefore named was a bar to the said bill of your petitioner; and it was thereupon ordered, adjudged, and decreed that the said decree of the circuit court last above named stand affirmed. And said Supreme Court thereupon issued its mandate to that effect to this court. And this court did, upon the filing said mandate, viz, on or about the thirteenth day of September, 1869, dismiss the said bill with costs.

Fourth. That John Nesmith, named in said record, deceased about two years ago, and the respondents, Buttrick, Fellows, and Talbot, of said Lowell, have been duly appointed executors of his will; and that Daniel Saunders, named in said record, also deceased about eighteen months ago, and Caleb Saunders, of said Lawrence, has been duly appointed administrator upon his estate, and said executors and administrator have entered upon and assumed their respective trusts.

And your petitioner further shows that he did not enter an appeal from the said final decree of the circuit court, made in his suit first hereinbefore named, upon the return of the mandate from the Supreme Court of the United States dismissing his bill absolutely, and denying his prayer that the same should be dismissed without prejudice, because he was advised by counselors learned in the law that the said decree would not be a bar to any future action or suit he might institute to obtain relief; and that he allowed the time prescribed by law for taking said appeal to pass away only because he relied on the advice and instruction of his said counselors; that in consequence thereof he has, by lapse of time, lost his right under the laws of appealing from said decree and of obtaining relief.

Your petitioner humbly shows unto your honors that, in and by the acts of said respondents in said bill stated and charged, and in said cause proved, he has been deprived of his estate without compensation, and that in and by said decree rendered in this cause on the said seventh day of June, A. D. 1855, and on the fourth day of May, A. D. 1858, he has been denied the relief and restitution to which of right and by the rules of the court of equity he is entitled. And he respectfully specifies certain of the many errors apparent upon the record of said cause, viz:

9 First. Inasmuch as by the decree of this court entered on the seventh day of June, A. D. 1855, it was adjudged that certain of the respondents should, at the election of the complainant, fulfil the conditions of the agreement of the eighteenth day of March, 1845, "paying him the full agreed price for said estate, viz, the sum of twenty-seven thousand dollars ($27,000), and interest," deducting therefrom, among other sums, "the sum paid by said Essex Company to Robert Farley for the title of Jacob Howe, the assignee of the complainant," your petitioner believes that the fact was judicially found that the said agreement was binding upon said named respondents, and your petitioner believes that permitting the respondent to deduct from the $27,000 (the sum named in said contract) anything as and for moneys paid for the title of Jacob Howe was an error in law and in fact, resulting from a misinterpretation of the language of said agreement.

Second. It was error to permit any proof touching, or to give consideration or weight to the Howe title upon the pleadings.

Third. If the contract of 18th of March was not in and by said decree

sustained, then the respondents hold the estate for your petitioner, the complainant, and he was and is entitled to have the same conveyed to him upon the payment of the moneys paid by the respondents to clear the title, or upon such terms as the court should decree just and reasonable. And your petitioner believes that the Supreme Court, upon the hearings of said cause before named, found facts which entitled him to relief in the premises, and that the honorable justices thereof were divided in opinion touching the nature of said relief, and the mode of administering the same, and hence the decree of this court dismissing said bill was affirmed by the legal effect of said division, and not by the judgment of said court pronounced upon consideration of the law and the facts embraced in said record.

And your petitioner shows that he desires in another action to maintain his rights to said estate; and inasmuch as he is instructed it is not practicable for this honorable court to grant further and complete relief in this cause, he prays that said decree of the 4th of May, A. D. 1858, may be revoked or so modified that his said bill of complaint be dismissed without prejudice to his further proceeding at law or equity, and for such other and further relief as to your honors may seem meet.

To the end, therefore, that the respondents may, if they can, show cause why this complainant should not have the relief hereby prayed and may answer the premises, the complainant waiving the oath of each and all of said respondents, may it please your honors to grant to your complainant a writ of subpœna ad respondendum, issuing out of and under the seal of this honorable court, directed to said respondents, the Essex Company, Charles S. Storrow, Edward S. Rand, John A. Buttrick, John K. Fellows, Charles P. Talbot, Cableb Saunders, and Samuel Lawrence, commanding them to appear and make answer to this bill, and to abide by and perform such order and decree herein as this court shall make.

And the complainant will ever pray.

ADOLPHUS DURANT.

JNO. F. BARRETT, *Solicitor.*
C. CUSHING,
E. F. HODGES,
Of Counsel.

DISTRICT OF MASSACHUSETTS, *ss:*

On this twenty-sixth day of June, A. D. 1874, appeared before me Adolphus Durant, known to me to be the person who subscribed the foregoing, and made oath that the statements in said petition by him subscribed were true.

WINSLOW WARREN,
Commissioner of the U. S. Circuit Court.

This cause was thence continued from term to term to the May term of this court, A. D. 1875, when the following pleas in bar and accompanying answers were filed, namely:

Plea in bar of Essex Company et al.—Filed August 28, 1875.

The respondents, the Essex Company, Rand and Storrow, Buttrick, Talbot and Fellows, executors of John Nesmith, Saunders, administrator of Daniel Saunders, not confessing any of the matters and things in said petition or bill mentioned to be true in such manner and form as the same

are therein alleged, and not waiving any objections to the manifold imperfections and insufficiences of the said bill or petition, but relying thereon, do plead to the said bill or petition, and for cause of plea say that the complainant did, on the eleventh day of October, A. D. 1847, in this honorable court, exhibit his bill of complaint against the Essex Company, then and now a corporation formed and existing under the laws of the commonwealth of Massachusetts, and Edward S. Rand, Charles S. Storrow, Daniel Saunders, Samuel Lawrence, John Nesmith, named in the present bill or petition, Daniel Saunders, jr., and Stephen Barker, alleging that he was the owner of certain parcels of land in the town of Methuen, in Essex County, Massachusetts; that he had raised money by mortgages thereof; that on March 29, 1843, he conveyed said lands to Jesse Sargent, of Andover; that on or about October 21, 1843, he became insolvent and petitioned for the benefit of the statute of Massachusetts commonly known as the insolvent act; that June 1, 1844, his assignee in insolvency conveyed to Joseph Foster whatever right, title, or interest said complainant had October 21, A. D. 1843, in and to said lands; that by deed April 7, 1845, said Foster conveyed the same to Robert Farley; that August 20, 1846, said Farley conveyed the same to the Essex Company; that September 11, 1843, said Sargent conveyed to Stephen Barker all his title under the deed from the complainant of March 29, 1843.

That after the conveyances by the said complainant Durant to Sargent, and by Sargent to Barker, the said complainant claimed to be the virtual and equitable owner of said land, and entitled to control the disposition and sale of the same, and that said Barker held the same upon a secret trust for him; that thereupon, and on or about March 18, 1845, said Durant made a bargain respecting the sale
12 thereof, which bargain was actually negotiated with Barker, Saunders and Durant, to Lawrence, Saunders and Nesmith for the price of $27,000, less the amount necessary to be paid to settle the mortgages and other incumbrances thereon, and on or about said day said Durant made a conditional deed of the premises to said Saunders, Lawrence and Nesmith, and on the nineteenth day of March, 1845, said Barker made an absolute conveyance of the same to said Saunders, Lawrence, and Nesmith, and within three days afterward said deeds were duly recorded by the grantees. And he alleged that the nature of the transaction was such that the said Saunders, Lawrence and Nesmith did not thereby acquire a good equitable title to the land as against the complainant, and were not entitled to retain and hold against him the legal title thus obtained.

That Saunders, Lawrence and Nesmith, on April 1, 1845, conveyed to Rand and Storrow, as trustees for the Essex Company; and that Rand and Storrow, claiming under the title thus acquired, did, on June 7, 1845, convey the same to the Essex Company.

That the Essex Company, when they received said conveyance, had full knowledge of the complainant's alleged claim, and of the transactions between him and the other defendants. But that the Essex Company claimed to hold the lands under the Saunders, Lawrence and Nesmith or Barker title, and also claimed to hold them under the Farley or assignee's title, and denied the complainant's right, and June 16, 1847, brought a writ of ejectment against him in the supreme judicial court of the commonwealth of Massachusetts for the said county of Essex. He then prayed that the deeds to Saunders, Lawrence and Nesmith might be declared void, and that the Essex Company might be decreed to convey to him the said lands on payment by him of such sums as he

ought in equity to pay for the reimbursement to them of money expended by them in procuring assignments of the mortgages thereon; and that the Essex Company might be enjoined from further prosecuting the action of ejectment aforesaid against the complainant during the pendency of proceedings under his bill, and that he might have such further and other relief as the nature of the case might require.

And thereafter said Stephen Barker duly answered to said bill, and in his answer he did deny that he ever made said agreement with
13 said Durant as by him in his bill alleged, or that the said deed from said Barker to said Lawrence, Saunders, and Nesmith was made and delivered without the knowledge or in fraud of the rights of said Durant; but, on the contrary, alleged and declared that said deed from him (said Barker) to said Saunders, Lawrence, and Nesmith was executed and delivered by him with the knowledge and assent and at the request of the said Durant; and also that he had good right to sell and convey said lands as aforesaid.

And that thereafter the complainant amended his said bill by striking out the name of Stephen Barker wherever the name of said Barker was therein inserted.

And that the said Daniel Saunders, jr., did file his several demurrer to said bill; and that thereafter said bill was dismissed by the court as to said Saunders, jr., with costs for him.

And that the respondent, Daniel Saunders, filed his several answer to said bill, wherein he denied that he ever understood or believed that said Durant had any interest in said lands, as alleged in said bill, at the time of the negotiation between said Barker and said respondent Saunders. And said Saunders denied that by virtue of the pretended agreement in said bill alleged, or in any other way, he was in any way bound to take the pretended title of said Durant to said lands, or that he violated any rights of said Durant, legal or equitable, by electing not to take the same. And alleged that said deed from said Barker to said Saunders, Lawrence, and Nesmith was the free act and deed of said Barker, and that said Durant had express notice thereof. And that the sole consideration thereof was the sum of $125, which sum was paid to said Barker before the delivery of his absolute deed. And he denied that it was agreed, as alleged in said bill, that neither of the instruments executed and delivered at the house of said Barker, as alleged, should be put upon record, unless the said respondents should elect to take the complainant's title, as alleged. And he denied that said Barker was the agent of said Saunders, Lawrence and Nesmith, and their associates, to negotiate for the purchase of said lands. And alleged that thereafter certain persons other than said associates subscribed very largely for stock in the Essex Company, a corporation afterwards formed and respondents in said bill, and became
14 stockholders therein, and that he and Lawrence and Nesmith also became stockholders therein. And that said lands and others were sold by said associates to said corporation in pursuance of the intention of the said associates in purchasing said lands, and at a profit of $30,000.

And said Lawrence put in his several answer to said bill, wherein he alleged, among things, that said lands were purchased by him and his associates with the expectation that a corporation would be formed and that they should sell said lands to said corporation at a profit; that a corporation was afterwards formed and called the Essex Company, and that he and his associates did sell said lands and other lands to said corporation at a profit of $30,000. And he denied the complainant's

claims, and denied that any fraud had been practised, and denied that any trust ever existed between Durant and Barker, or between Durant and the respondents, and denied that he ever had knowledge or notice of any such trust or interest in the complainant as the complainant alleged.

And said Nesmith put in his several answer to said bill, wherein he alleged and denied substantially as said Lawrence is hereinbefore stated to have alleged and denied.

And said Rand did file his several answer to said bill, wherein, upon information and belief, he admitted the mortgages and the deeds to Sargent and to Barker, and by Durant's assignee in insolvency to Foster, as in the first paragraph of this plea recited. And he alleged that, March 19, 1845, Barker conveyed to Lawrence, Saunders and Nesmith by a conditional deed, and said condition being duly complied with, said Barker conveyed to them absolutely by deed dated March 26, 1845; and that subsequently Lawrence, Saunders and Nesmith conveyed to Rand and Storrow, and they to the Essex Company, as already recited. That neither at the time of said conveyance to said Rand and Storrow, nor at the time of the payment of the consideration therefor by the Essex Company, had the said Rand, nor said Storrow, nor the Essex Company, any notice that Durant had any title to or trust in said lands or that any fraud had been practised or attempted, or any agreement violated with reference to said lands. That subsequently said Robert Farley claimed to be the owner of certain mortgages on said lands, and especially one made by Durant, under which possession to foreclose was taken July 6, 1842, and the right of redeeming, which would expire July 6, 1845, and also claimed to be the absolute owner thereof in fee, under the assignee's deed hereinbefore recited; that litigation ensued thereupon between Farley and the Essex Company, and, upon the advice of counsel, the Essex Company purchased said Foster or Farley title and paid for the same. And that Durant knew of said litigation and was not only silent as to any defect in the title of the Essex Company, and as to any fraud attempted to be committed upon him, but offered himself as a witness to support their title, and upon being examined as to his competency to testify, he declared that he had no claim to said lands nor under any contract whichever way said suit might terminate.

And the said Storrow did put in his several answer to said bill, wherein he did allege and deny substantially as the said Rand is hereinbefore stated to have alleged and denied.

And the said Essex Company did put in their several answer to said bill, wherein they alleged and denied as the said Rand is hereinbefore stated to have alleged and denied.

And the said Essex Company in their said answer further alleged that since the said conveyance to Storrow and Rand for the said Essex Company, the value of said premises had been greatly enhanced by the expenditure of large sums of money by said respondents in the vicinity thereof, and by the creation by said respondents and by persons claiming under them of a great amount of water power, and the erection of mills, etc., and the collection of a large population in that vicinity.

And that at no time had they authorized said Storrow to treat and settle with Durant except upon the basis of a free gift at their discretion.

And, further answering, they denied any written agreement or memorandum in writing between the respondents and Durant, or between him and Barker, whereby any contract was evidenced or trust declared;

and pleaded the Revised Statutes of Massashusetts, c. 59, § 30, that no trust, excepting such as may arise by implication of law, shall be created or declared unless by an instrument in writing signed by the party creating or declaring the same.

16 And § 29, that all estates or interests in lands created or conveyed without an instrument in writing shall have the force of estates at will only; and no estate shall be assigned, granted, or surrendered unless by writing or operation of law.

And § 31, that "no trusts concerning lands, whether implied by law or created or declared by the parties, shall defeat the title of a purchaser for valuable consideration, and without notice of the trust."

And that said respondents averred that they were purchasers for a valuable consideration, and without notice of the trust pretended by Durant.

And that not waiving, but relying upon said statutes, and other matters aforesaid, as a complete defence, the said respondents, further answering, said:

That although neither the Essex Company, nor Storrow, nor Rand, nor Lawrence, Sargent, and Nesmith, or either of them, had any notice or suspicion of the facts alleged by Farley and others in derogation of the title of Barker, as derived from Sargent, until long after Barker's title had by the conveyances mentioned become vested in the Essex Company, but on the contrary the Essex Company, Storrow and Rand, and Lawrence, Saunders, and Nesmith, upon the representations made to them at the times of these negotiations about the title, acted upon the faith that it was a true and perfect title at law and in equity to all the estate which Durant had in the premises at the date of his deed to Sargent, purporting to convey the same for $6,000; yet said respondents, upon information since received, and for the purpose of putting all material facts in issue, and submitting the evidence to the court, but having no personal knowledge, averred—

That although they purchased said land in 1845 from Lawrence, Saunders and Nesmith in good faith, and believed at the time that they thereby acquired a perfect title, yet upon information since received, and for the purpose of putting all material facts in issue, they alleged that at the time of said deed of Durant to Sargent said Durant was insolvent and contemplated taking the benefit of said insolvent law; that said deed was not upon any valuable, good, or lawful considera-

17 tion, but was intended for the purpose of giving said Sargent a preference as to a small indebtedness, but chiefly for the purpose of defrauding the creditors of said Durant; of all which said Sargent and Barker at all times had full knowledge; that said deed was void as against creditors, and was void under said insolvent law. That said Durant, October 20, 1843, filed his petition under said insolvent law of Massachusetts, and that thereupon such proceedings were had that all the estate of said insolvent and all property transferred by him in fraud of his creditors were transferred to and became vested in his assignee. That, in the due course of said insolvency proceedings, said Durant applied for his discharge from his debts, which was opposed by said Foster, a creditor, upon the grounds that the said transfer of property to Sargent was fraudulent, whereupon a hearing was had before a master in chancery, and, upon appeal, before one of the justices of the supreme court, wherein it was in effect adjudged that said deed was fraudulent and void, and that by reason thereof, and of his fraudulent concealment of property as aforesaid, he was not entitled to his discharge; and thereafter, on or about June 1, 1844, the assignee, in due form of

law, made sale of the said premises, at public auction, to said Foster, and subsequently, in pursuance of said sale, duly conveyed the same to said Foster, who afterwards conveyed to Farley, as aforesaid. That said Farley also held a mortgage on the premises, which became foreclosed in his hands. That the new and distinct title thus acquired by said Farley, and the said premises, were afterwards conveyed by said Farley to said Essex Company, and constituted a good title in them, free from alleged equities of the said Durant, if any such existed, growing out of the alleged transactions between himself and Sargent, Barker, Saunders, Lawrence, and Nesmith, if such transactions ever took place. And that the title pretended by said Barker and said Durant to be held by said Barker was and was known to both of them to be fraudulent and void as against creditors, and especially as against said Foster and Farley. But that nevertheless said Barker and said Durant pretended that said Barker title was a good and perfect title, and did not disclose said adverse claims nor make known any of said facts and circumstances. And said Essex Company insisted that the alleged attempts of the complainant to obtain a large sum of money for his
18 alleged equitable claims and for the Barker title, and his attempts to induce the respondents, the Essex Company, to advance large sums of money for the payment of his mortgage debts were attempted frauds on the respondents, and disabled the complainant from setting up any claim for relief arising upon any alleged interest under the Barker title or upon any transactions or promises with or to him during his concealment of such adverse and better title than held by Foster or Farley.

And these respondents say that said complainant did reply to said answers, and that testimony upon both sides was taken and published, and that other proceedings were had in said cause, and that said cause thereafter, on or about the day of , A. D. 1855, at the May term, 1855, came on to be heard on its merits, and was argued by the counsel of the respective parties, and thereafter, to wit, June 7, 1855, the said circuit court did declare that the defendants, Saunders, Lawrence, and Nesmith, were liable, at the election of the complainant, to fulfil the conditional agreement made by said Saunders with the complainant on the eighteenth of March, 1845, by taking from him a sufficient release of his wife's possibility of dower in the premises in said bill mentioned, and paying him the full agreed price for said estate, viz, the sum of $27,000 and interest from the twenty-sixth of March, 1845, and also a reasonable compensation for any services rendered after that time by the complainant in perfecting the title of the Essex Company thereto, after deducting the sum of $125, then paid said Barker, and all sums necessarily paid by the Essex Company in procuring assignments of mortgages on the land, or otherwise procuring a clear title thereto, including the sum paid by said company to Robert Farley, or his title under the Hubbard mortgage, and for the title of Jacob Howe, the assignee of the complainant, in his hands, with interest from the times of said payments respectively, and deducting also the sum of $2,000, the agreed value of a certain Fondrinier machine embraced in the said conditional agreement, and which has been delivered to the complainant, with interest from the date of such delivery, and deducting also a reasonable annual rent for the premises in the possession of the complainant during the pendency of this suit; and the court did order and decree that it be referred to Edward G. Loring, esquire,
19 a master in chancery of this court, to ascertain and report as soon as may be, what, if anything, computed as above, would be pay-

able to the complainant; and did further order, adjudge, and decree that the complainant's bill be dismissed with costs, as against the defendants Rand, Storrow, and the Essex Company, and all further orders and decrees were reserved for the further consideration of the court.

And that on the third day of September, A. D. 1855, the complainant came and declined to accept the relief to which, by said interlocutory decree of the court in said cause, he was declared to be entitled as against the defendants, Lawrence, Saunders and Nesmith, without prejudice to his right of appeal.

And that afterwards, on the third day of September, 1855, said cause came on for further hearing, and upon consideration thereof, and of the refusal of the complainant appearing of record to accept the relief to which by said interlocutory decree he was declared to be entitled as against the defendants, Lawrence, Saunders and Nesmith, it was ordered, adjudged, and decreed that the complainant's bill be and it thereby was dismissed against said defendants without costs for either party.

Whereupon the said Durant then and there claimed an appeal to the Supreme Court of the United States, next to be holden at Washington, and the same was allowed accordingly.

And that thereafter said cause came on to be heard by said Supreme Court of the United States, on the day of , A. D. 1857, and was argued by counsel, and thereupon, February 24, 1858, it was ordered, adjudged, and decreed by said Supreme Court that the said final decree of said circuit court should stand affirmed with costs for the defendants.

And that thereafter, on the day of , A. D. 1858, at the October term, A. D. 1857, Elias Merwin, the solicitor of said respondents, duly produced in the said circuit court a mandate of said Supreme Court, ordering that said decree should stand affirmed with costs as aforesaid, and that execution should issue against said Durant, and in favor of all said defendants, for their costs of said appeal.

And that thereupon said Merwin moved said honorable circuit court that said mandate might be placed on file, and that execution might issue on the judgment of said court of the May term, A. D. 1865, against said Durant for the costs of said Storrow, Rand and the Essex Company severally, and for the costs of the defendants in said Supreme Court, according to the said mandate.

And that thereupon the said Durant, by Sidney Bartlett and C. B. Goodrich, his solicitors, resisting the said motion, prayed said honorable court that said Durant might have leave to discontinue his said bill of complaint, or that the same might be dismissed without prejudice, which motion of the plaintiffs was denied. And it was further ordered, adjudged, and decreed by said court that execution should issue in favor of all said defendants in said cause, and against said Durant, for their costs in the said Supreme Court of the United States, and in favor of said Rand, Storrow, and the Essex Company respectively, for their several costs in said circuit court, and that the judgment aforesaid should stand affirmed. A copy of the decree of this court of June 7, 1855, and of all the record in this court in said cause subsequent thereto is annexed, marked Exhibit A.

And these respondents further say that the said court had jurisdiction of the subject-matter of said bill and of the parties thereto.

And these respondents do aver and plead that the complainant did exhibit his said bill of complaint in said honorable court against said defendants, among whom were these respondents, or the persons deceased

whose estates they represent, with reference to the same lands, and for the same matters, and to the same effect, and for the like relief and purpose as the complainant doth by his present bill or petition demand and set forth; all which matters and things these respondents do aver and plead in bar to the said complainant's present bill, and humbly pray the judgment of this honorable court whether it behooves them to make any further or other answer thereunto than as aforesaid, and pray hence to be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

Second. And these respondents do further plead in bar to the said bill, and for further cause of plea do say, that the said Essex Company did, on the sixteenth day of June, A. D. 1847, in the supreme judicial court of Massachusetts, for the county of Essex, bring their writ of entry against said Durant to recover the premises in said complainant's bill mentioned and referred to: that the said Durant did plead
21 thereto that he had not disseized the said plaintiffs, the said Essex Company, in manner and form as alleged. That a trial was had on said writ of entry in said honorable court, at the November term, A. D. 1858; that at said trial said Essex Company, the plaintiffs, offered in evidence and relied on a deed from said Durant to Jesse Sargent, dated March 29, 1843, and recorded April 26, 1843;

A deed from said Sargent to said Stephen Barker, dated September 11, 1843, and recorded March 21, 1845;

A deed from said Barker to Daniel Saunders, Samuel Lawrence and John Nesmith, dated March 26, 1845, and recorded March 27, 1845;

A deed from said Saunders, Lawrence and Nesmith to E. S. Rand and Charles S. Storrow, trustees for the Essex Company, dated April 1, 1845, and recorded April 5, 1845;

A deed from said Rand and Storrow to said Essex Company, the demandants in said writ of entry, dated and recorded July 7, 1845.

That the demandants, said Essex Company, also claimed said premises under a title derived by them from Jacob Howe, the assignee of said Durant, as an insolvent debtor, and claimed that the conveyances aforesaid of said Durant to Sargent and of Sargent to Barker were made for the purpose of defrauding the creditors of said Durant, and in contemplation of his applying for a discharge as an insolvent debtor; that said Sargent and Barker, when they received their conveyances respectively, knew, participated in, and assisted to carry out said fraudulent purpose; that these conveyances were duly avoided by the assignee under whom the demandants claimed, they having been ignorant, as they claimed, of the fraudulent character of said conveyances until some time after the conveyances of said Saunders et al. to and Rand Storrow, and Rand and Storrow to the demandants; and that thereupon they introduced the following evidence:

The deed of assignment of James H. Duncan, master in chancery, conveying in the usual form to Jacob Howe, as the assignee of said Durant, all the estate, real and personal, of which the said Durant was possessed, or in which he was interested, on the twenty-first day of October, A. D. 1843, dated Nov. 3, A. D. 1843, and recorded Nov. 4, A. D. 1843.
22 The deed of said Howe, as assignee, aforesaid, conveying the demanded premises to one Joseph Foster, dated June 1, A. D. 1844, and recorded April 8, 1845.

The deed of said Foster to Robert Farley, dated April 7, 1845, and recorded April 8, 1845.

The deed of said Farley to the demandants, dated Aug. 20, 1846, and recorded Aug. 20, 1845.

That the said demandants, the Essex Company, also introduced (the defendant objecting thereto as incompetent and all objections to its competency being reserved) the record of a suit in equity, brought Oct. 11, 1847, by the said Durant, in the United States circuit court for the district of Massachusetts, against the said Essex Company, Rand and Storrow, and Saunders, Lawrence and Nesmith, in which, after a hearing, there was a decree dismissing the bill as against the said Essex Company and the said Rand and Storrow with costs, and decreeing certain relief in favor of said Durant against the other respondents, viz, Saunders, Lawrence and Nesmith, which relief the said Durant declining to accept, there was a decree dismissing the bill as against the last-named respondents also, from which decree the said Durant appealed to the Supreme Court of the United States, and that upon consideration said decree was affirmed by said Supreme Court.

That said demandants claimed that their title to the demanded premises was in issue in said suit in equity, and particularly that the title of said Howe, as the assignee of said Durant, and their title as derived from said assignee, and also their title as bona fide purchasers of Barker's title through Saunders et al. and Rand and Storrow, without notice of any claim, equitable or otherwise, of said Durant to said premises, were material issues in said suit in equity, and were decided in their favor, and that said record in these respects and otherwise was conclusive upon the defendant as to all matters which were or could be in controversy in said suit at law.

That in regard to the title derived by the demandants from said Barker, through the conveyances of Saunders et al. and Rand and Storrow, aforesaid, the defendant contended and offered to prove that, previous to Barker's conveyance to Saunders et al., said Barker had made a verbal agreement with him, Durant, by which Bar-
23 ker agreed to hold said premises in trust for Durant; that Durant was to find a purchaser, and was to receive all that should be paid for the same, except the sum of $100 or $125, which was to be retained by Barker, and that Barker was to convey only to such person as Durant should direct. That when Saunders et al. applied to Barker to purchase these premises, they were informed by him of this agreement, and directed to negotiate with Durant as the party in interest; that thereupon they did negotiate with Durant, and made a conditional bargain with him to purchase the estate, paying him therefor and for his wife's release of dower $27,000, less the incumbrances thereon; that they were also to take a deed from Barker, conveying the legal title, for $125; that accordingly conditional deeds were given by the said Durant and Barker, which were to become absolute at the election of said Saunders and others, upon their paying within a specified time the consideration agreed upon; that it was part of their agreement that said Saunders et al. were not to take an absolute conveyance from said Barker unless they also took one from said Durant and paid him the agreed consideration therefor; that in fraud of said agreement and of the rights of said Durant, the said Saunders et al. did obtain an absolute deed from said Barker of the legal title, and then refused to complete their conditional agreement with him, said Durant, and that said Rand and Storrow and the Essex Company, when they took their conveyances aforesaid, had full notice of all these facts.

That the demandants thereupon objected to the competency of the facts thus offered to be proved by the defendant, for the reasons—

First. That said facts, if proved, would constitute no answer to the

demandants' legal title, either as derived from said assignee or from said Barker, and were no defence to this writ of entry.

Second. That said facts were all materially in issue, and were passed upon in said suit in equity, and that the final decree therein was conclusive upon the defendant, and a bar to said defence.

That thereupon said evidence was reported to the full court, and that afterwards said case was heard by the full court, sitting at Boston, on the tenth day of January, A. D. 1860 and was argued by
24 counsel, and that thereupon it was finally adjudged by said court that the said Essex Company recover of said Adolphus Durant the premises in and by their said writ of entry demanded.

And these respondents do aver and plead that the pretended agreements, trusts, rights, titles, doings, and transactions set forth or referred to in this present bill or petition are the same as set up, relied on, and adjudicated upon in said writ of entry.

Third. And these respondents, for a further plea, do say that on the day of October, A. D. 1861, said Durant did exhibit his bill of complaint in the supreme judicial court of the commonwealth of Massachusetts, in and for the county of Essex, against the said Essex Company, wherein he alleged and claimed and prayed as in his said bill in this court he had theretofore alleged and claimed and prayed, as hereinbefore set forth. And the said Essex Company put in their plea in bar of said bill, and in and by said plea they pleaded the proceedings theretofore had in this honorable court and in the Supreme Court of the United States as herein alleged; and they further pleaded the proceedings in the supreme judicial court of Massachusetts upon the writ of entry, as hereinbefore alleged. And said Essex Company, answering said bill in support of their said plea, in accordance with the rules and practice of said court, did allege and deny as by their answer herewith filed in support of this plea they allege and deny.

And these respondents further say that said cause came on to be heard at Salem, at the April term, 1863, of said supreme court; that evidence was introduced by the complainant and by said respondents at said hearing, and among other evidence the complainant introduced a certificate of the clerk of the Supreme Court of the United States, as follows:

"This cause came on to be heard on the transcript of the record from the circuit court of the U. S. for the district of Massachusetts, and was argued by counsel; on consideration whereof, it is now hereby ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby affirmed with costs. By a divided court.

25 "I, William Thomas Carroll, clerk of the Supreme Court of the U. S., do hereby certify that the preceding extract from the minutes of the Supreme Court of the U. S., is a true copy of the decree of the said Supreme Court, rendered in the above-entitled cause; that the same was by a court equally divided, and that there was no opinion pronounced or filed by said court in the case."

Thereupon said cause was, in accordance with the rules and practice of said court, reported for the consideration of the full court, who were to make a proper order thereon.

And thereafter, to wit, on the tenth day of March, A. D. 1864, said cause came on to be heard by the said full court and was argued by counsel; and thereupon it was ordered, adjudged, and decreed that the complainant's bill be dismissed, with costs for the respondents.

And these respondents further say, that the said court had jurisdic-

tion of the subject-matter of said bill and of the parties thereto; all of which matters and things these respondents do aver and plead in bar to the present bill or petition, and humbly pray the judgment of this honorable court whether it behooves them to make any further or other answer thereto than as aforesaid, and pray hence to be dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

Fourth. And these respondents, for a further plea, do say that on the twenty-ninth day of April, A. D. 1865, said Durant did exhibit his bill of complaint in this court against said Essex Company, wherein he alleged, and claimed, and prayed, substantially and in effect as in and by said former bill in this court, and in and by said bill in the supreme judicial court of the commonwealth of Massachusetts, as hereinbefore set forth, he had alleged, claimed, and prayed; and to said bill said Essex Company did plead in bar the said bill, suit, proceedings, and decrees of and in this court and the Supreme Court of the United States, and the said writ of entry, suit, proceedings, and judgment of the supreme judicial court of the commonwealth of Massachusetts, and the said bill, suit, proceedings, and decree in said suit in equity in the supreme judicial court of the commonwealth of Massachusetts, as hereinbe-
26 fore set forth; and in support of their said plea said Essex Company did file their answer to said bill, of like tenor and effect as their answer to said bill in the supreme judicial court of the commonwealth of Massachusetts, as hereinbefore set forth. And the said complainant did set down the said pleas to be argued, and the same were argued by the counsel for the respective parties at the October term, A. D. 1866, before the honorable Nathan Clifford, associate justice, and the honorable John Lowell, district judge. Whereupon said court adjudged and determined that the plea in bar of the record, proceedings, and decree of the former suit theretofore brought in this court by said complainant was good and sufficient in law. Whereupon the complainant took issue upon said plea, and evidence was introduced and heard by the court; and thereupon the court found said plea to be true, and thereupon ordered and decreed that the complainant's said bill be dismissed, with costs for the respondents. Whereupon said complainant claimed an appeal to the Supreme Court of the United States, which appeal was allowed accordingly; and said appeal came on to be heard at Washington, at the December term, 1868, and was argued by counsel for the respective parties; and thereafter said Supreme Court did order, adjudge, and decree that the said decree of the circuit court should stand affirmed, with costs.

And thereafter, on the first day of September, A. D. 1869, J. J. Storrow, esquire, the solicitor of said respondents, duly produced in the said circuit court a mandate of said Supreme Court, ordering that said decree should stand affirmed, with costs as aforesaid, and that execution should issue against said Durant and in favor of said defendant for its costs of said appeal; and thereupon, upon notice to the counsel for said complainant, it was ordered, adjudged, and decreed by said circuit court, on the thirteenth day of September, A. D. 1869, that execution should issue in favor of said respondent and against said Durant, for its costs in said Supreme Court and for its costs in said circuit court, and that the judgment aforesaid should stand affirmed.

And these defendants further say that the said court had jurisdiction
of the subject-matter of said bill and of the p : eto
27 And these respondents say that in the said last mentioned suit in equity said complainant did allege and claim and contend, par-

ticularly, among other things, that the decree in said first mentioned suit in equity in this court ought not to be held a bar because the affirmance thereof by the Supreme Court of the United States was by "a divided court," and the said Essex Company did thereupon claim and contend that said fact did not make said decree any the less a bar, and that it was a bar, and did also claim and contend that the proceedings in the said circuit court upon the coming down of the mandate and the refusal of the said court to decree that the bill be dismissed without prejudice, and the action of said court in the premises, was an express adjudication that the merits had been fully heard and passed upon in said suit, and that the court intended that the litigation should not be opened anew; that if said adjudication was erroneous said complainant could have caused the same to have been corrected upon appeal, and responding to said contention, said Supreme Court in its decision rendered at said December term, 1868, did expressly determine and adjudge that the said action was an express adjudication as contended for by said respondent as aforesaid. All which matters and things these respondents do plead in bar to said bill or petition, and pray whether they shall be required to make any other or further answer thereto.

Fifth. And these respondents do further plead in bar to said bill or petition, and for plea say that by the Revised Statutes of Massachusetts, passed in the year 1836, chapter 119, and re-enacted in the General Statutes of Massachusetts, of the year 1860, chapters 154 and 155, it was enacted that no person shall commence any action for the recovery of lands, nor make any entry thereon, unless within twenty years after the right to bring such action or make such entry first accrued, or within twenty years after he or those from, by or under whom he claims have been seized or possessed of the premises, and that no action shall be commenced for any purpose more than twenty years after said cause of action first accrued. And these respondents say that if said complainant ever had any cause of action or suit against any of these defendants, or against said Saunders, Lawrence or Nesmith for or concerning any of the matters in his said bill or petition mentioned or referred to, which these respondents do in no sort admit, such cause of action,
28 suit or right of entry did accrue or arise more than twenty years before the filing of the present bill or petition; all which matters and things these respondents do aver to be true, and do plead the same in bar to the whole of said bill or petition, and humbly pray the judgment of this honorable court whether they are bound to make any other or further answer to said bill or petition.

Sixth. And these respondents do further plead in bar to said bill or petition, and for plea say that if the said complainant ever had any cause of action or suit against them for or concerning any of the matters in said bill of complaint mentioned, which these respondents do in no sort admit, such cause of action did accrue or arise a long time, namely more than twenty-nine years before the filing of the present bill or petition, and that more than sixteen years have elapsed from the time of the rendering of the final decree of this honorable court in the first suit of said complainant above set forth, and that the claim now set up by the complainant is a stale and unreasonable claim, and that he has been guilty of gross and unreasonable negligence and laches in filing the same, not admitting that the complainant now has or has alleged any claim or ground of claim whatever, and that, relying upon the judgment and decrees in said suit, the said Essex Company has expended large sums of money and made great improvements on the premises aforesaid, and largely added to the value thereof, and that a large number

of persons, relying upon said judgment, became and now are stockholders in said Essex Company, and that said Essex Company, long before the filing of the present bill or petition, has sold and conveyed substantially all said premises to more than seventy different purchasers (excepting such parts as have been laid out or used as public ways), who have built factories and dwellings thereon, and who bought the same in good faith for valuable considerations, relying on said judgments and decrees, all of whom are of this district, and that, as against those stockholders and against those purchasers as well as against these respondents, the claims now set up by the complainant are grossly stale, unreasonable, and inequitable; all which matters and things these respondents do aver to be true, and they plead the same in bar to said bill or petition, and humbly pray whether they are bound to make any other or further answer thereto.

29 Seventh. And these respondents, for a further plea, do say that this court has no power or jurisdiction to grant the relief prayed for by the complainant.

That the lapse of time since the judgment complained of is such that by the laws of the United States the complainant is not entitled to any relief asked for by his present bill or petition, or in the premises.

That the said bill or petition is defective in respect of parties, in that it should have made respondents thereto the said named, and all other purchasers of said lands, all of whom were well known to the complainant.

And they say that said Nesmith died on the fifteenth day of October, A. D. 1869; that his will was duly proved, and said Buttrick, Fellows and Talbot were appointed executors thereof November 9, 1869, and that due notice of their appointment was given November 10, 1869, as required by law, and that the estate of said Nesmith was fully settled, divided, paid over, and the accounts of said executors duly passed and approved by the probate court long before the filing of the present bill or petition, and before said executors had notice of any claim by said Durant, and that by the statutes of this commonwealth no suit or proceeding can be maintained against them.

And they further say that said Barker and said Sargent and said Nesmith and Daniel Saunders died before the filing of the present bill or petition.

And so these respondents pray the judgment of this honorable court, whether they are bound to make any other or further answer to said complainant, and that they may be hence dismissed with their reasonable costs and charges, in this behalf most wrongfully sustained.

ESSEX COMPANY,
By CHAS. S. STORROW, *Treas. and Agent.*
CHAS. S. STORROW.
EDWARD S. RAND.
C. P. TALBOT.
JOHN H. BUTTRICK.
JAMES K. FELLOWS.
CALEB SAUNDERS,
By J. J. STORROW, *His Attorney.*

JAMES J. STORROW,
Solicitor, and of Counsel.

30 I, the undersigned, of counsel, with said respondents, do hereby certify that, in my opinion, the foregoing plea is well founded in point of law, and is not intended for delay.

JAMES J. STORROW.

I, Charles S. Storrow, above named, on behalf of myself and of said Essex Company, on oath depose and say that the matters and things in the foregoing plea stated are true in point of fact, and that said plea is not interposed for delay.

CHAS. S. STORROW.

DISTRICT OF MASSACHUSETTS, *ss:*

AUG. 20, 1874.

Subscribed and sworn to by the said Charles S. Storrow, before me,

ELIAS MERWIN,
U. S. Commissioner.

We, Edward S. Rand, C. P. Talbot, John A. Buttrick, James K. Fellows, on oath respectively depose and say that the matters and things in said plea stated as done by each of us respectively are true, and as to all other matters and things therein stated, we believe them to be true, and we further say that said plea is not interposed for delay.

EDWARD S. RAND.
C. P. TALBOT.
JOHN K. BUTTRICK.
JAMES K. FELLOWS.
CALEB SAUNDERS.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

SEPT. 2, 1874.

Personally appeared Rand, Talbot, Buttrick and Fellows, above named, and made oath to the truth of the above affidavit by them subscribed.

Before me,

[SEAL.]

ELIAS MERWIN,
U. S. Commissioner.

COMMONWEALTH OF MASSACHUSETTS,
Essex, ss:

JULY 23, 1875.

Personally appeared the above-named Caleb Saunders and made oath to the truth of the above affidavit, by him subscribed.

Before me,

CHAS. D. MOORE,
Notary Public.

31 EXHIBIT A.

Copy from record of U. S. circuit court for district of Massachusetts in suit in equity. Adolphus Durant v. Essex Company and others.

Extract begins May term, 1855, and contains everything from that point to end of record.

At this term of this court this cause came on to be heard and was argued by counsel, and upon consideration thereof, to wit, June 7th, 1855, the court doth declare that the defendants, Saunders, Lawrence, and Nesmith are liable at the election of the complainant to fulfil the conditional agreement made by said Saunders with the complainant on the 18th March, 1845, by taking from him a sufficient release of his wife's possibility of dower in the premises in said bill mentioned, and
32 paying him the full agreed price for said estate, viz, the sum of

$27,000 and interest from the 26th March, 1845, and also a reasonable compensation for any services rendered after that time by the complainant in perfecting the title of the Essex Company thereto, after deducting the sum of one hundred and twenty-five dollars, then paid said Barker, and all sums necessarily paid by the Essex Company in procuring assignments of mortgages on the land, or otherwise procuring a clear title thereto, including the sum paid by said company to Robert Farley in his title under the Hubbard mortgage, and for the title of Jacob How, the assignee of the complainant, in his hands, with interest from the times of said payments respectively, and deducting also the sum of two thousand dollars, the agreed value of a certain Fourdrinier machine embraced in said conditional agreement, and which has
33 been delivered to the complainant, with interest from the date of such delivery, and deducting also a reasonable annual rent for the premises in the possession of the complainant during the pendency of this suit; and the court doth order and decree that it be referred to Edward G. Loring, esquire, a master in chancery of this court, to ascertain and report, as soon as may be, what, if anything, computed as above, would be payable to the complainant; and doth further order, adjudge, and decree that the complainant's bill be dismissed with costs, as against the defendants, Rand, Storrow, and the Essex Company; and all further orders and decrees are reserved for the further consideration of the court.

And on the second day of July, A. D. 1855, the following report of the master was filed in this cause, viz:

JULY 2D, 1855.

34 By virtue of the order hereto annexed, I have heard the parties in the said cause, and examined their vouchers and evidences, and find and report that there is due to the said complainant the sum of sixty-eight dollars and eight cents, according to the schedule annexed and marked A, all of which is respectfully reported.

EDWARD G. LORING,
Master in Chancery.

35 A.

Adolphus Durant in ac. with D. Sanders et al., June 4th, 1855.

DR.

1845, Mar. 26.	P'd Stephen Barker	$125		
	Int. to date	76 50		
				$201 50
" May 14. "	John Tenney	1,273		
	Int. to date	769		
				2,042
" " 21.	Abigail Durant	1,270		
	Int. to date	764		
				2,034
" " 22. "	Mercantile Bank	4,212		
	Int. to date	2,538		
				6,750
1846, Aug't 20. "	Robert Farley:			
	1. P'd Marland m'tg'e	1,720		
	Int. to date	906 44		
				2,626 44

	2d. P'd Hubbard m'tg's....	4,592 25	
	Int. to date.....	2,528 93	
			7,121 18
	3d. " Howe title.....	11,723 75	
	Int. to date.....	6,178 41	
			17,901 16
1849, May 1.	Value of Fourdrinier machine del'd Durant.....	2,000	
	Int. to date.....	752	
			2,752
	Over.....		$41,428 28
36	Dr. am't debit bro't over.....		$41,428 28
1847, Jan'y 6.	P'd B. R. Curtis for professional services in suit v. Farley, settled this date ..	447	
	Int. to date.....	201	
			648
June , 1847.	To rent, 8 years, of house to date, 6 acres of land in Lawrence, occupied by compl't, @ $200 pr. annum.....		1,600
			43,676 28

CR.

Mar. 26, 1845.	By agreed value of estate.....	$27,000	
	Int. to date.....	16,424	
		43,424	
	By reasonable compensation for services in procuring assignments of m'tg'es.....	200	
	Int. to date.....	120 36	
		43,744 36	
	Amounts brought up.....	43,744 36	
			43,676 28
	Balance due compl't.....		68 08
			$43,744 36

37 And on the 3d day of September, A. D. 1855, the complainant comes and declines to accept the relief to which by the interlocutory decree of the court in this cause he is declared to be entitled, as against the defendants, Samuel Lawrence, John Nesmith and Daniel Saunders, without prejudice to his right of appeal.

And afterwards, on the same 3d of September, 1855, this cause came on for further hearing, and upon consideration thereof and of the refusal of the complainant appearing of record to accept the relief to which by the decree heretofore made in this cause he was declared to be entitled, as against the defendants, Samuel Lawrence, John Nesmith and Daniel Saunders, it is ordered, adjudged and decreed, that the complanant's bill be and is hereby dismissed against said defendants, without costs for either party.

38 Whereupon the said Durant then and there claimed an appeal to the Supreme Court of the United States, to be holden at Washington on the first Monday of December next, and gave good and sufficient security to prosecute his appeal with effect, and to answer all damages and costs if he shall fail to make good his appeal; which security was approved by the court and the said appeal allowed accordingly.

A true record. Attest:

H. W. FULLER, *Clerk.*

UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Friday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

ADOLPHUS DURANT
against
39 SAMUEL LAWRENCE, JOHN NESMITH, Daniel Saunders, Edward S. Rand, Charles S. Storrow and the Essex Company.

And now Elias Merwin, the solicitor of the above-named defendants, comes and produces to this court a mandate of the Supreme Court of the United States in the above entitled cause in the words and figures following, namely:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Whereas, lately, in the circuit court of the United States for the district of Massachusetts before you, or some of you in a cause between Adolphus Durant, complainant, and Samuel Lawrence and others, defendants, in chancery, the decree of the said circuit court was in the following words, viz: "And afterwards, on the same 3d of Sep-
40 tember, 1855, this cause came on for further hearing, and upon consideration thereof, and of the refusal of the complainant appearing of record to accept the relief to which by the decree heretofore made in this cause he was declared to be entitled, as against the defendants Samuel Lawrence, John Nesmith and Daniel Saunders, it is ordered, adjudged and decreed, that the complainant's bill be and is hereby dismissed against said defendants, without costs for either party," as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and fifty-seven, the said cause
41 came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel, on consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be and the same is hereby affirmed with costs, and that the said defendants recover

against the said complainant, Adolphus Durant, two hundred and seven dollars and eighty-two cents for their costs herein expended, and have execution therefor Feb'y 24.

You therefore are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the honorable Roger B. Taney Chief Justice of the Supreme Court, the first Monday of December in the year of our Lord one
42 thousand eight hundred and fifty-seven.

Costs of defendants: Clerk, 187.82; attorney, 20—$207.82, taxed by Wm. Thos. Carroll, clerk of the Supreme Court of the United States.

And thereupon said Merwin moves this hon'l. court that the said mandate may be placed on file and that execution issue on the judgment of this court of May term, A. D. 1856, against said Durant for the costs of said Storrow, Rand, and the Essex Company, severally, and for the costs of the defendants in said Supreme Court according to the said mandate.

Whereupon the said Durant, by Sidney Bartlett and C. B. Goodrich, his solicitors, resisting the said motion, prays this honorable court that said Durant may have leave to discontinue his said bill of complaint, or that the same may be dismissed without prejudice; which
43 motion of the plaintiff was denied; and it is further ordered, adjudged, and decreed by the court that execution issue in favor of all said defendants in this cause and against said Durant for the sum of two hundred and seven dollars and eighty-two cents costs by them sustained in the Supreme Court of the United States, and in favor of said Rand for his costs in this court taxed at two hundred and thirty dollars and fifty-four cents, and in favor of said Storrow for his costs, here taxed at two hundred and thirty dollars and fifty-four cents, and in favor of said Essex Company for their costs in this court taxed at five hundred and fifty-seven dollars and ninety-one cents, and that the judgment aforesaid do stand affirmed.

A true record. Attest:

[SEAL.] H. W. FULLER, *Clerk.*

44 *Answer of Essex Company et al.—Filed August* 28, 1875.

Answer of respondents Essex Company, Rand, Storrow, Buttrick, Fellows, Talbot, and Saunders, accompanying their plea in bar, said answer being filed in comformity to the thirty-second rule of this court.

And these respondents, not waiving said plea, but wholly relying and insisting thereon, and in aid and support thereof, for answer to so much of said complainant's bill as they are advised is material or necessary for them to make answer unto, answer and say that they are informed and believe and admit that the said Stephen Barker did make a conveyance of the lands described in the said bill to Messrs. Saunders, Lawrence, and Nesmith, and that said Saunders, Lawrence, and Nesmith did thereafter convey the same to said Rand and Storrow in trust for said Essex Company, and that said Rand and Storrow did thereafter convey said premises to said Essex Company at or about the times respectively in said bill set forth; but these respondents deny that said Saunders, Lawrence, and Nesmith, or either of them, were the agents of said Essex Com-

pany to procure or purchase said lands, or that they or either of them acted or were authorized to act as the agents of said Essex Company in any negotiation for the same set forth in said bill or petition, either with said complainant or with said Stephen Baker; but these respondents admit that said Rand and Storrow were the agents and trustees of said Essex Company. And these respondents are informed and believe that the said complainant, at the time of the said conveyance by the said Barker to said Saunders, Lawrence, and Nesmith, had no right, title, or interest whatever, either legal or equitable, to the said premises, and they deny that he had any such right, title, or interest.

45

And these defendants, upon their information and belief, deny that the conveyance of said Barker to said Saunders, Lawrence, and Nesmith was procured by means of the fraudulent representations, pretences and practices in said bill or petition alleged; but these respondents are informed and believe, and do answer that said conveyance was received by said Lawrence, Saunders, and Nesmith in good faith and by means of no fraud practised by them or either of them, and that no right of said complainant was violated thereby. And that said Barker had a good right to convey, and the said Saunders, Lawrence, and Nesmith had a good right to purchase said premises without any reference to said complainant; and these defendants are informed and believe that neither Saunders, Lawrence, or Nesmith ever agreed or contracted with said Durant, or with said Barker, that they would not take a deed from said Barker of said premises unless they also took a conveyance from said Durant, as is alleged in said bill or petition, and upon the terms therein alleged; and these defendants deny every allegation in said bill or petition to the contrary thereof.

And these defendants, upon their information and belief, deny that the conveyances of said Saunders, Lawrence, and Nesmith to said Rand and Storrow, trustees, was made in pursuance of the purpose to obtain said premises in violation of the right of said complainant to the same, or in fraud of any agreement or understanding between said complainant and said Saunders, as in said bill or petition is alleged; and these defendants deny that the conveyance to said Essex Company by said Rand and Storrow was made in pursuance of such alleged fraudulent purpose; but these defendants answer and say that the conveyance aforesaid to said Essex Company was made in good faith and for a full consideration paid by it, and that at the time it received the same it had no knowledge, information or belief, and no reason to suspect or believe that the said complainant had or pretended to have any right, title, or interest, legal or equitable, in or to said premises, or that he had made the agreement with said Barker, or had had the negotiations with said Saunders, in reference to the conveyance of said premises, set forth and alleged in his said bill or petition.

46

And these defendants are informed and believe and make answer that the said Rand and Storrow, when they received their deed from said Saunders, Lawrence, and Nesmith, and when they paid them the consideration therefor, had no knowledge, information or belief, or reason to suppose that the said Durant had or made any claim whatever to said premises, or that he had or made any complaint that any right or agreement of his had been violated or prejudiced by the conveyance of said Barker to said Saunders, Lawrence, and Nesmith, as in said bill or petition is alleged.

And these respondents, further answering, say that the said Rand and Storrow, as the trustees and agents of the Essex Company, purchased

said premises of said Saunders, Lawrence, and Nesmith in good faith, and paid therefor a full consideration, and that they and said Essex Company supposed and believed that said Essex Company thereby acquired a full and perfect title to said premises, subject only to certain mortgages not now in dispute.

And these respondents answer and say that said Essex Company purchased, and, until sales of the same made to purchasers, did hold said premises in good faith, and for a valuable consideration, and without notice of any claim by said Durant thereto.

And these respondents, not admitting, but denying, upon their information and belief, that said complainant ever made the agreements, or had the understandings in reference to said premises with said Saunders, in his bill set forth, deny that either they or any of them ever conspired with the said Barker, Saunders, Lawrence, and Nesmith, or either of them, to procure a conveyance of said premises in fraud or violation of or contrary to the right of said complainant, as in his said bill or petition most unjustly is alleged against them.

And these defendants deny every allegation in said bill or petition in that regard.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the bill or petition charged, without this, that any other matter or cause or thing in the said
47 complainant's said petition or bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein or hereby well or sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

ESSEX COMPANY,
By CHAS. S. STORROW,
Treas. and Agent Essex Co.
CHAS. S. STORROW.
EDWARD S. RAND.
C. P. TALBOT.
JOHN A. BUTTRICK.
JAMES K. FELLOWS.
CALEB SAUNDERS,
By J. J. STORROW.
CALEB SAUNDERS.

JAMES J. STORROW,
Solicitor and of Counsel.

DISTRICT OF MASSACHUSETTS, *ss :*

BOSTON, *August* 20, *A. D.* 1874.

Then personally appeared Charles S. Storrow, treasurer and agent of said Essex Company, and in their behalf deposed and said, that he had read the foregoing answer by him subscribed as treasurer of said company, and knew the contents thereof, and that the same are true so far as stated on personal knowledge, and so far as stated on information and belief he believes them to be true.

ELIAS MERWIN,
U. S. Commissioner.

DISTRICT OF MASSACHUSETTS, *ss:*

BOSTON, *August* 31, *A. D.* 1874.

Then personally appeared the above-named Charles S. Storrow, Edward S. Rand, C. P. Talbot, John A. Buttrick, James K. Fellows, and made oath that they had read the foregoing answer by
48 them subscribed; that so far as it stated the acts of either of these affiants such affiant knew the same to be truly stated, and as to all other matters therein stated each affiant swore that he believes the same to be true.

ELIAS MERWIN,
U. S. Commissioner.

COMMONWEALTH OF MASSACHUSETTS,
Essex, ss:

JULY 23, 1874.

Then personally appeared the above-named Caleb Saunders, and made oath that he had read the foregoing answer by him subscribed; that so far as is stated the acts of him the said affiant knew the same to be truly stated, and as to all other matters therein stated he swore that he believes to be true.

Before me,
[SEAL.]

CHAS. D. MOORE,
Notary Public.

Plea in bar of Samuel Lawrence.—Filed Aug. 28, 1875.

This respondent, Samuel Lawrence, not confessing any of the matters and things in said petition or bill mentioned to be true in such manner and form as is therein alleged, and not waving any objections to the manifold imperfections and insufficiencies of the said bill or petition, but relying thereon, doth plead to the said bill or petition, and for cause of plea doth say as the said Essex Company and others in and by their plea in this cause have alleged and said, and he hereby adopts the same as his plea as aforesaid.

And he prays the judgment of this honorable court whether he is bound to make any other or further answer to said complainant, and that he may be hence dismissed with his costs.

SAM. LAWRENCE.

JAMES J. STORROW,
Sol'r, and of Counsel.

49 I, the undersigned, of counsel with the said respondent, do hereby certify that in my opinion the foregoing plea is well founded in point of law, and is not intended for delay.

JAMES J. STORROW.

I, Samuel Lawrence, above named, on oath depose and say that the matters and things in the foregoing plea stated are true in point of fact, and that said plea is not interposed for delay.

SAM. LAWRENCE.

COMMONWEALTH OF MASSACHUSETTS,
Berkshire, ss:

JULY 21, 1875.

Subscribed and sworn to by the said Samuel Lawrence before me,

said premises of said Saunders, Lawrence, and Nesmith in good faith, and paid therefor a full consideration, and that they and said Essex Company supposed and believed that said Essex Company thereby acquired a full and perfect title to said premises, subject only to certain mortgages not now in dispute.

And these respondents answer and say that said Essex Company purchased, and, until sales of the same made to purchasers, did hold said premises in good faith, and for a valuable consideration, and without notice of any claim by said Durant thereto.

And these respondents, not admitting, but denying, upon their information and belief, that said complainant ever made the agreements, or had the understandings in reference to said premises with said Saunders, in his bill set forth, deny that either they or any of them ever conspired with the said Barker, Saunders, Lawrence, and Nesmith, or either of them, to procure a conveyance of said premises in fraud or violation of or contrary to the right of said complainant, as in his said bill or petition most unjustly is alleged against them.

And these defendants deny every allegation in said bill or petition in that regard.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the bill or petition charged, without this, that any other matter or cause or thing in the said
47 complainant's said petition or bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein or hereby well or sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

ESSEX COMPANY,
By CHAS. S. STORROW,
Treas. and Agent Essex Co.
CHAS. S. STORROW.
EDWARD S. RAND.
C. P. TALBOT.
JOHN A. BUTTRICK.
JAMES K. FELLOWS.
CALEB SAUNDERS,
By J. J. STORROW.
CALEB SAUNDERS.

JAMES J. STORROW,
Solicitor and of Counsel.

DISTRICT OF MASSACHUSETTS, *ss :*

BOSTON, *August* 20, *A. D.* 1874.

Then personally appeared Charles S. Storrow, treasurer and agent of said Essex Company, and in their behalf deposed and said, that he had read the foregoing answer by him subscribed as treasurer of said company, and knew the contents thereof, and that the same are true so far as stated on personal knowledge, and so far as stated on information and belief he believes them to be true.

ELIAS MERWIN,
U. S. Commissioner.

DISTRICT OF MASSACHUSETTS, *ss:*

BOSTON, *August* 31, *A. D.* 1874.

Then personally appeared the above-named Charles S. Storrow, Edward S. Rand, C. P. Talbot, John A. Buttrick, James K. Fellows, and made oath that they had read the foregoing answer by
48 them subscribed; that so far as it stated the acts of either of these affiants such affiant knew the same to be truly stated, and as to all other matters therein stated each affiant swore that he believes the same to be true.

ELIAS MERWIN,
U. S. Commissioner.

COMMONWEALTH OF MASSACHUSETTS,
Essex, ss:

JULY 23, 1874.

Then personally appeared the above-named Caleb Saunders, and made oath that he had read the foregoing answer by him subscribed; that so far as is stated the acts of him the said affiant knew the same to be truly stated, and as to all other matters therein stated he swore that he believes to be true.

Before me,
[SEAL.] CHAS. D. MOORE,
Notary Public.

Plea in bar of Samuel Lawrence.—Filed Aug. 28, 1875.

This respondent, Samuel Lawrence, not confessing any of the matters and things in said petition or bill mentioned to be true in such manner and form as is therein alleged, and not waving any objections to the manifold imperfections and insufficiencies of the said bill or petition, but relying thereon, doth plead to the said bill or petition, and for cause of plea doth say as the said Essex Company and others in and by their plea in this cause have alleged and said, and he hereby adopts the same as his plea as aforesaid.

And he prays the judgment of this honorable court whether he is bound to make any other or further answer to said complainant, and that he may be hence dismissed with his costs.

SAM. LAWRENCE.

JAMES J. STORROW,
Sol'r, and of Counsel.

49 I, the undersigned, of counsel with the said respondent, do hereby certify that in my opinion the foregoing plea is well founded in point of law, and is not intended for delay.

JAMES J. STORROW.

I, Samuel Lawrence, above named, on oath depose and say that the matters and things in the foregoing plea stated are true in point of fact, and that said plea is not interposed for delay.

SAM. LAWRENCE.

COMMONWEALTH OF MASSACHUSETTS,
Berkshire, ss:

JULY 21, 1875.

Subscribed and sworn to by the said Samuel Lawrence before me,

Henry J. Dunham, a notary public within and for the county of Berkshire, in the State of Massachusetts, on this twenty-first day of July A. D. 1875.

[SEAL.] H. J. DUNHAM,
Notary Public.

Answer of Samuel Lawrence.—Filed August 28, 1875.

Answer of the respondent, Samuel Lawrence, accompanying his plea in bar, said answer being filed in conformity to the thirty-second rule of this court.

This respondent, not waiving his said plea, but wholly relying and insisting thereon, and in aid and support thereof, for answer to so much of said complainant's bill as he is advised is material or necessary for him to make answer to, adopts as his answer the answer of the Essex Company and others, filed in this cause, and denies and alleges as therein is denied and alleged, save only that as to all statements therein contained which set forth the acts, doings, or knowledge of this
50 respondent upon the knowledge and belief of said Essex Company and other respondents, this respondent declares that of his own knowledge he knows such statements to be true.

And so he prays to be hence dismissed, with his costs.

SAM. LAWRENCE.

JAMES J. STORROW,
Solicitor, and of Counsel.

COMMONWEALTH OF MASSACHUSETTS,
Berkshire, ss :

JULY 21, 1875.

Personally appeared the foregoing Samuel Lawrence, and made oath that he has read the foregoing answer, by him subscribed, and knows the contents thereof; that so far as the same are stated of his own knowledge and so far as they relate to his own acts, he knows the same to be true, and as to all other matters, he verily believes the same to be true.

Before me,

[SEAL.] H. J. DUNHAM,
Notary Public.

On the fourth day of October, A. D. 1875, the following motion to dismiss petition was filed by the defendants, namely:

Motion to dismiss petition.—Filed October 4, 1875, *as of August* 28, 1875.

Now come the respondents, the Essex Company, Rand, Storrow, Buttrick, Fellows, Talbot, and Saunders, and move that the said petition be dismissed, for the reasons and upon the grounds set forth in their plea this day filed, to which reference is hereby made, and also for the reason that upon the facts alleged in said petition said Durant is not entitled to the relief prayed for.

By JAMES J. STORROW,
Their Attorney & Solicitor.

51 This cause was thence continued from term to term to this present term, and on the seventeenth day of May, A. D. 1876, was

fully heard upon said pleas in bar and upon said motion to dismiss, the honorable Nathan Clifford, associate justice, and the honorable John Lowell, district judge, sitting together and holding said court.

On the second of September, A. D. 1876, the opinion of the court was read by the honorable John Lowell, district judge; and thereupon the following decree was entered, namely:

Decree.

This cause came on to be heard at this present term, upon the pleas in bar filed Aug. 28, 1875, and upon the motion to dismiss filed Oct. 4, 1875, as of Aug. 28, 1875, and was argued by counsel for the respective parties; and now, upon consideration thereof, to wit, September 2nd, A. D. 1876, it is ordered, adjudged, and decreed that the said pleas be adjudged sufficient and said motion granted, and that the petition in this cause be and the same is hereby dismissed, with costs taxed at fifty-three dollars and ninety-two cents.

From this decree the said complainant claims an appeal to the Supreme Court of the United States, and gives good and sufficient security that he will prosecute his said appeal to effect, which security is approved by the court, and said appeal is allowed accordingly.

A true record. Attest:

JOHN G. STETSON, *Clerk.*

52 The following is a copy of the opinion of the court in this cause in accordance with which judgment was entered for the defendants, namely:

Opinion of the court.—Sept. 2, 1876.

ADOLPHUS DURANT
v.
THE ESSEX CO. ET AL.

Before Clifford and Lowell, JJ.:

LOWELL, J.

The petitioner asks that a decree of this court, passed May 4, 1858, by which his bill against the respondents, or the parties whom the respondents now represent, was dismissed generally, may be modified, and that the dismissal may now be made without prejudice to his further proceeding at law or in equity.

The history of the litigation between the parties is remarkable. The complainant brought his bill in this court, in 1847, alleging frauds, by which, as he said, a conveyance of his lands had been obtained by certain persons who had conveyed them to the Essex Company with notice, and seeking to establish a trust for his benefit in all the land and its proceeds.

In 1855 Judge Sprague, after a hearing upon the merits of the case, made a decree which decided a part of the case against the complainant, but gave him an account against certain of the defendants for the purchase-money originally agreed to be paid him for it, deducting
53 amounts already paid or otherwise chargeable against the same.

Finding that this decree would give him a comparatively trifling amount of money, the complainant refused to take a decree, and the bill was dismissed. An appeal was taken to Washington, and the decree

dismissing the bill was affirmed by a divided court. When the mandate of affirmance came down the complainant moved that the order should be that the bill stand dismissed without prejudice. After argument this motion was refused, and the order was made which we are now asked to modify.

Afterwards the Essex Company brought a writ of entry against the complainant in the supreme court of Massachusetts, and recovered judgment for the lands in controversy. (Essex Co. v. Durant, 14 Gray, 447.) But the decision of the court was against the complainant, on the ground that, whether the defence set up by him, of a trust for his benefit, was true or false in fact, it was not sufficient in a court of common law. Thereupon he brought a suit in equity in the same court, and was defeated by the the defence that the decree of this court against him was a bar. (Durant v. Essex Co., 8 Allen, 103.) Then he brought a suit in this court, who held the law in the same way, and that decree was affirmed by the Supreme Court. (Durant v. Essex Co., 7 Wallace, 107.)

The complainant, as we have said, now asks us to modify the decree entered in this court upon the return of the mandate in the first-mentioned case, so that it may no longer be a bar to any suit he may be advised to bring upon the trusts and frauds relied on by him in the bill brought in 1847.

It is admitted by both parties that the decree dismissing the bill generally, if erroneous, might have been reviewed by the Supreme Court, if the complainant had appealed at any time within five years after it was entered. He accounts for the delay by alleging that counsel advised
him that a decree of this court, entered in pursuance of an order
54 from the Supreme Court, had no effect as a bar to further litigation
if the Supreme Court had been equally divided in opinion upon the merits of the original decree; or, in other words, that a decree of this court, affirmed by the Supreme Court, was of less effect than if it had never been appealed from. No doubt he was so advised, strange as it may seem, though with how much positiveness we do not know.

The respondents have pleaded in bar all the facts above referred to, and they insist, among other things, that after such a lapse of time no court has ever opened a case for a mistake of law, and that such an order as is asked for would be giving the plaintiff, indirectly, the right of appeal, which he has lost by delay, which no court, from which an appeal lies, has any right to do. These arguments are strong, but the point on which we shall decide the case is, that Judge Sprague's order was not erroneous, and, if it were to be entered to day, would be the true and proper order.

It might be contended with much plausibility that the decree which was made and appealed from should not have been a dismissal generally, but a decree for the complainant for the small sum found due him. One of the cases cited seems to have some bearing in favor of such a suggestion. (McNeil v. Barkewill, 2 Bligh, 228.) We do not mean to say that such a decree would or would not have been proper. Whether so or not, it was a part of the decree appealed from, and was affirmed by the Supreme Court. When the mandate came down, affirming generally a general dismissal of the bill, it would have been clearly erroneous for this court to have entered a decree for the complainant for the sum which it would before have given him if he would have taken it. Certainly a decree that would leave open the main part of the case, which Judge
Sprague had decided against the complainant, would have been
55 not only without precedent, but contrary to all precedent. The
misfortune of the complainant is that he lost his case by the opin-

ion of only a bare majority of all the judges who heard it; but this is no sound reason for giving him now, or at any former time, a right to attempt to reverse that majority.

Petition dismissed.

56 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings (including the opinion of Esthe circuit court) in the cause of Adolphus Durant, petitoner, v. The sex Company et al., defendants, in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston in said district, this twenty-first day of July, in the year of our Lord eighteen hundred and seventy-seven, and of the Independence of the United States the one hundred and second.

[SEAL.] JOHN G. STETSON, *Clerk.*

57 *Bond to party on appeal.*

Know all men by these presents that we, Adolphus Durant, of Salem, in the county of Rockingham, in the State of New Hampshire, as principal, and Warren A. Durant, of Lawrence, in the State of Massachusetts, as surety, are held and firmly bound unto Charles S. Storrow and Edward S. Rand, both of Boston, State of Massachusetts, the Essex Company, a corporation established by the laws of Massachusetts, doing business in said Boston, John A. Buttrick, James K. Fellows, and Charles P. Talbot, of Lowell, executors of John Nesmith, deceased, and Caleb Saunders, of Lawrence, administrator of the estate of Daniel Saunders, and Samuel Lawrence, of the city and State of New York, in the sum of one thousand dollars, to be paid to the said Charles S. Storrow and others, obligees, their certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit in equity depending in said court, between said Adolphus Durant, complainant, and the said Charles S. Storrow, the Essex Company, and others, defendants, decree was rendered against the said Adolphus Durant, and the said Adolphus Durant having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said Adolphus Durant shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

ADOLPHUS DURANT. [L. S.]
WARREN A. DURANT. [L. S.]

Signed, sealed, and delivered in presence of—
JON. F. BARRETT.

Approved.

G. F. SHEPLEY,
U. S. Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

58 *Citation.*

By the honorable John Lowell, district judge of the United States for the district of Massachusetts, one of the judges of the circuit court of the United States for the said district, to Charles S. Storrow and Edward S. Rand, both of Boston, in the county of Suffolk; the Essex Company, a corporation duly established under the laws of the commonwealth of Massachusetts, and having its usual place of business in said Boston; John A. Buttrick, James K. Fellows, and Charles P. Talbot, of Lowell, executors under the will of John Nesmith, late of Lowell, in the county of Middlesex, deceased; and Caleb Saunders, of Lawrence, administrator of the estate of Daniel Saunders, late of Lawrence, in the county of Essex, deceased, all of said commonwealth, and citizens thereof; and Samuel Lawrence, of the city, county, and State of New York, defendants in a cause in equity lately determined in said circuit court, wherein Adolphus Durant, of Salem, in the county of Rockingham, in the State of New Hampshire, and a citizen of said State, is petitioner:

Whereas said Adolphus Durant has lately appealed from a decree in said cause lately rendered in said circuit court in the favor of you, the said defendants, to the Supreme Court of the United States, you, the said Charles S. Storrow and others, defendants, are hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Boston, in the district of Massachusetts, in the first judicial circuit, this thirtieth day of December, in the year of our Lord one thousand eight hundred and seventy-six.

JOHN LOWELL,
District Judge.

Sufficient service of this citation is hereby acknowledged.

JAMES J. STORROW,
For Appellees.

(Indorsement on cover:) No. 208. Adolphus Durant, appellant, vs. Charles S. Storrow, Edward S. Rand, The Essex Company, John A. Buttrick, James K. Fellows, and Charles P. Talbot, executors of John Nesmith, deceased; Caleb Saunders, administrator of Daniel Saunders, deceased; & Samuel Lawrence. Massachusetts C. C. U. S. Filed 3rd October, 1877.

Supreme Court of the United States.

OCTOBER TERM, 1879.

IN EQUITY.

ADOLPHUS DURANT

v.

ESSEX ~~COUNTY~~ Company ET ALS.

COMPLAINANT'S BRIEF.

E. F. HODGES.

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1880.

Supreme Court of the United States.

OCTOBER TERM, 1879.

IN EQUITY.

ADOLPHUS DURANT *v.* ESSEX CO. ET ALS.

COMPLAINANT'S BRIEF.

E. F. HODGES.

In March, 1845, the complainant and respondents entered into such relations concerning certain land, upon which a portion of the city of Lawrence now stands, as to charge the resp trustees of the title to said land for the complainant.

To enforce his rights, the complainant brought his l Court, where the bill was dismissed, and the decree of dis after two hearings before the Supreme Court at Washington, affirmed "by a divided Court," they not being able to agree upon the merits of the question.

The Court, upon the return of the mandate, finally dismissed the bill absolutely, in May, 1858, refusing the complainant's motion that the bill be dismissed without prejudice.

This petition seeks relief from the injurious consequences resulting from that decree, and exposes errors upon the face of the record and decree, in support of his petition.

I.

Brief statement of facts from the record of the original case bearing upon the errors assigned.

Prior to the twenty-ninth day of March, 1843, the complainant was the owner of the tract of land in dispute, situated in Methuen,

Supreme Court of the United States.

OCTOBER TERM, 1879.

IN EQUITY.

ADOLPHUS DURANT *v.* ESSEX CO. ET ALS.

COMPLAINANT'S BRIEF.

E. F. HODGES.

In March, 1845, the complainant and respondents entered into such relations concerning certain land, upon which a portion of the city of Lawrence now stands, as to charge the respondents as trustees of the title to said land for the complainant.

To enforce his rights, the complainant brought his bill in the Circuit Court, where the bill was dismissed, and the decree of dismissal was, after two hearings before the Supreme Court at Washington, affirmed "by a divided Court," they not being able to agree upon the merits of the question.

This Court, upon the return of the mandate, finally dismissed the bill absolutely, in May, 1858, refusing the complainant's motion that the bill be dismissed without prejudice.

This petition seeks relief from the injurious consequences resulting from that decree, and exposes errors upon the face of the record and decree, in support of his petition.

I.

Brief statement of facts from the record of the original case bearing upon the errors assigned.

Prior to the twenty-ninth day of March, 1843, the complainant was the owner of the tract of land in dispute, situated in Methuen,

now the city of Lawrence, in Massachusetts, encumbered by sundry mortgages.

On that day he conveyed said lands in fee to Jesse Sargent, receiving from said Sargent assurance of reconveyance upon the performance of certain conditions. (Old record, page 309.)

On the eleventh day of September, 1843, Sargent conveyed this land to Stephen Barker for a nominal consideration ($15). (Old record, page 301.) Subsequently and prior to the 18th of March, 1845, Barker agreed with Durant to convey said land to Durant's order, on the payment of $125. (Old record, page 103.) About the middle of March, 1845, Saunders, Lawrence and Nesmith, through the agency of Saunders, entered upon negotiations with Durant for the purchase of this land. Barker was called in, and, to a great extent, acted as negotiator between the parties. Pending the negotiations, or immediately preceding them, Barker, at Durant's request, executed and acknowledged a deed conveying these lands to one Thorndike, of Salem, and delivered the deed to Durant, who forwarded it to Thorndike. At the request of Saunders, Durant procured a return of this deed from Thorndike, and renewed the negotiations with Saunders. (Old record, pages 103 and 109.)

Finally, it was on the 18th of March, 1845, agreed between Durant, Barker and Saunders, that Barker should convey his interest in said lands to Lawrence, Nesmith and Saunders, by deed conditioned to be void, unless the grantees paid $125 within forty-three days from date. (Old tecord, pages 105, 108 and 302.)

On the 18th of March, 1845, Durant, with the co-operation of Barker, made a contract with Saunders, in behalf of himself and Lawrence and Nesmith, in these words: —

"METHUEN, March 18, 1845.

"This certifies that whereas I have this day negotiated with Adol-
"phus Durant for the purchase of his estate in Methuen, in behalf
"of Samuel Lawrence, John Nesmith and myself, and the said
"Durant has executed a deed of the same wherein the consideration
"named is five hundred dollars; now, therefore, it is hereby de
"clared that the contract and negotiation is made on the following
"terms, viz.: —

"If the said grantors shall elect to take the estate named in said "deed they are to pay the said Durant the sum of twenty-seven "thousand dollars for the same, deducting therefrom all the sums "which are necessary to be paid to settle the mortgages and other "encumbrances now on the estate conveyed by said deed.

"DANIEL SAUNDERS.

"It is further agreed and made a condition of the above-mentioned "negotiation that said grantors shall make known to said Durant "their determination whether they conclude to take the premises or "not on or before the first day of April next.

"DANIEL SAUNDERS."

Simultaneously with the above, Durant gave the deed above mentioned, which was signed by his wife in release of dower. Saunders, Lawrence and Nesmith took a deed of the same estate from Barker, dated the 19th of March, and recorded it with the second deed from Durant, on the 21st of the same March.

On the 1st of April, 1845, Saunders, for Lawrence and Nesmith, wrote to Durant the following letter: —

"APRIL 1, 1845.

"DEAR SIR: In pursuance of the agreement between you and "myself on or about the 18th of March last, I notify you that Mr. "Lawrence and Nesmith think it not advisable to take the paper "mill and real estate adjoining, upon the terms mentioned in our "conditional agreement. Yours, etc.,

"DANIEL SAUNDERS."

It will be observed that the deed from Durant had been, by Saunders and others, recorded ten days when the above letter was written.

The respondents then re-enforced their title as follows, viz.: Deeds were executed from

Barker to Lawrence et als., March 26, 1845.
Lawrence to Rand et als., April 1, 1845.
Randall et al. to Essex Co., June 7, 1845.
How, assignee to Foster, June 1, 1844.
Foster to Farley, April 7, 1845.
Farley to Essex Co., Aug. 20, 1846.

now the city of Lawrence, in Massachusetts, encumbered by sundry mortgages.

On that day he conveyed said lands in fee to Jesse Sargent, receiving from said Sargent assurance of reconveyance upon the performance of certain conditions. (Old record, page 309.)

On the eleventh day of September, 1843, Sargent conveyed this land to Stephen Barker for a nominal consideration ($15). (Old record, page 301.) Subsequently and prior to the 18th of March, 1845, Barker agreed with Durant to convey said land to Durant's order, on the payment of $125. (Old record, page 103.) About the middle of March, 1845, Saunders, Lawrence and Nesmith, through the agency of Saunders, entered upon negotiations with Durant for the purchase of this land. Barker was called in, and, to a great extent, acted as negotiator between the parties. Pending the negotiations, or immediately preceding them, Barker, at Durant's request, executed and acknowledged a deed conveying these lands to one Thorndike, of Salem, and delivered the deed to Durant, who forwarded it to Thorndike. At the request of Saunders, Durant procured a return of this deed from Thorndike, and renewed the negotiations with Saunders. (Old record, pages 103 and 109.)

Finally, it was on the 18th of March, 1845, agreed between Durant, Barker and Saunders, that Barker should convey his interest in said lands to Lawrence, Nesmith and Saunders, by deed conditioned to be void, unless the grantees paid $125 within forty-three days from date. (Old tecord, pages 105, 108 and 302.)

On the 18th of March, 1845, Durant, with the co-operation of Barker, made a contract with Saunders, in behalf of himself and Lawrence and Nesmith, in these words: —

"Methuen, March 18, 1845.

"This certifies that whereas I have this day negotiated with Adol-
"phus Durant for the purchase of his estate in Methuen, in behalf
"of Samuel Lawrence, John Nesmith and myself, and the said
"Durant has executed a deed of the same wherein the consideration
"named is five hundred dollars; now, therefore, it is hereby de
"clared that the contract and negotiation is made on the following
"terms, viz.: —

"If the said grantors shall elect to take the estate named in said "deed they are to pay the said Durant the sum of twenty-seven "thousand dollars for the same, deducting therefrom all the sums "which are necessary to be paid to settle the mortgages and other "encumbrances now on the estate conveyed by said deed.

"DANIEL SAUNDERS.

"It is further agreed and made a condition of the above-mentioned "negotiation that said grantors shall make known to said Durant "their determination whether they conclude to take the premises or "not on or before the first day of April next.

"DANIEL SAUNDERS."

Simultaneously with the above, Durant gave the deed above mentioned, which was signed by his wife in release of dower. Saunders, Lawrence and Nesmith took a deed of the same estate from Barker, dated the 19th of March, and recorded it with the second deed from Durant, on the 21st of the same March.

On the 1st of April, 1845, Saunders, for Lawrence and Nesmith, wrote to Durant the following letter: —

"APRIL 1, 1845.

"DEAR SIR: In pursuance of the agreement between you and "myself on or about the 18th of March last, I notify you that Mr. "Lawrence and Nesmith think it not advisable to take the paper "mill and real estate adjoining, upon the terms mentioned in our "conditional agreement. Yours, etc.,

"DANIEL SAUNDERS."

It will be observed that the deed from Durant had been, by Saunders and others, recorded ten days when the above letter was written.

The respondents then re-enforced their title as follows, viz.: Deeds were executed from

Barker to Lawrence et als., March 26, 1845.
Lawrence to Rand et als., April 1, 1845.
Randall et al. to Essex Co., June 7, 1845.
How, assignee to Foster, June 1, 1844.
Foster to Farley, April 7, 1845.
Farley to Essex Co., Aug. 20, 1846.

And sundry mortgages by assignment also came to the hands of said Essex ~~County~~ company

Thus whatever title Durant had, as beneficiary under Barker's deed, was conveyed to Lawrence, Saunders and Nesmith. But the title so conveyed is claimed by the respondents to be invalidated by the following circumstances: —

1. That Durant was, on the said 29th of March, 1843, insolvent, and that the deed from him to Sargent was made in fraud of the insolvent laws of Massachusetts, and was a fraudulent conveyance, because made to delay creditors.

2. That Durant went into insolvency under the laws of Massachusetts, on the 20th of October, 1843, and one How was appointed his assignee. (Old record, p. 239.)

3. That How conveyed all Durant's rights in said property to one Foster, and the same has come, by mesne conveyances, to the respondents, the Essex Co.

4. That by reason of the said insolvency of Durant, and his purpose to delay his creditors, the deeds to Sargent and Barker were invalid, and that the conveyance to the Essex Co. of the title taken by How, official assignee of Durant, gave to said company all the interest Durant had in said premises on the 29th of March, 1843.

Durant brought his bill in the Circuit Court in October, 1847, charging that the respondents had defrauded him of his property in the transaction before stated, and the same was in due course heard upon pleadings and proofs. The Court dismissed the bill as to some of the respondents, and charged others with such sum as should be found due under certain instructions by the Master. Upon coming in of the Master's report, awarding to Durant a trifling balance, he declined to accept it, and the Court dismissed the bill. From this decree Durant appealed to the Supreme Court at Washington, where the cause was heard twice, and finally the Court being unable to agree upon the merits of the cause, the decree, under a rule of law, stood affirmed "by a divided Court."

The mandate to this effect having been returned to the Circuit Court the decree was entered dismissing the bill absolutely, notwithstanding the motion of Durant's counsel that it should be without prejudice.

This is the decree we now have to deal with, and for the reformation and correction of which we urge this petition.

II. Facts Subsequent to the Decree.

1. In 1847 the Essex Co. brought suit in ejectment against the complainant for possession of a part of this land, which was decided in favor of said company and possession given by the sheriff in 1860.

2. In 1861 the complainant filed his bill in equity in the Supreme Judicial Court for the county of Essex, claiming substantially what he had claimed in the suit in the Circuit Court, and his bill was upon hearing dismissed.

3. In 1865 the complainant filed his second bill in the Circuit Court, urging substantially his original claim, which was, after hearing here and in Washington, dismissed.

4. The three last-mentioned suits were decided upon pleas in bar reciting the first decree.

Upon these facts the complainant asserts his claim to relief, and relies upon the errors manifest in the record.

Appellants' Assignment of Errors.

At the hearing upon this petition in the Court below, it was decided that the decrees entered in said Circuit Court on the seventh day of June, 1855, on the third day of September, 1855, and on the fourth day of May, 1858, which last decree dismissed the plaintiff's said bill, were proper decrees to have been entered in said original cause, whereas your petitioner avers that they were not proper decrees to be therein entered, for the following reasons apparent upon said record : —

First. Because in and by said decree of the seventh day of June, 1855, it was declared that certain of the defendants "are liable at "the election of the complainant to fulfil the conditional agreement "made by said Saunders with the complainant on the eighteenth "day of March, 1845, by taking from him a sufficient release of his "wife's possibility of dower in the premises in the said bill mentioned "and paying him the full agreed price for said estate, viz., the sum "of twenty-seven thousand dollars, with interest from the twenty-

" sixth day of March, 1845, and also a reasonable compensation for any " services rendered after that time by the said complainant in perfect- " ing the title of the Essex Co. thereto; after deducting one hun- " dred and twenty-five dollars then paid said Barker, and all sums " necessarily paid by said the Essex Co., in procuring assignments " of mortgages on the land or otherwise procuring a clear title " thereto, including the sum paid by said company to Robert Farley " for his title under the Hubbard mortgage, and for the title of Jacob " How the assignee of the complainant in his hands with interest," etc., etc., and the case was referred to a Master. Upon the coming in of the Master's report the complainant declined to accept the sum of sixty-eight $\frac{8}{100}$ dollars thereby found due, and thereupon, on the 3d of September, 1855, the Court ordered that the complainant's bill be dismissed against said defendants without costs to either party.

Whereas, The said final decree should, notwithstanding the said complainant's election not to receive said sum of sixty-eight $\frac{8}{100}$ dollars, have been that said defendants pay said sum to the complainant.

Second. By the above decrees it was judicially determined that said contract of the 18th of March, 1845, was valid and binding upon said defendants therein named, and that the complainant had some title in said lands which he had conveyed for the said consideration of twenty-seven thousand dollars.

Whereas, If the complainant did have on the 18th of March, 1845, any title to said lands, the said How (who took, if he ever had anything, *all* the complainant had on the twentieth day of October, 1843, by operation of law) had nothing which could have been conveyed to said company or anybody, and the price by said company for the How title should not have been deducted from the said sum of twenty-seven thousand dollars.

Third. Under the circumstances the respondents should not have been permitted to vouch the How title in their defence. The first deed in their chain of title was the deed of the complainant to their grantors — delivered upon certain conditions not complied with — while they retain this deed and the title it confers, they are estopped to assert its insufficiency arising under the insolvent laws, and exclude it from its place in the foundation of their title. No court had

passed upon or established the How title, nor had any creditors risen to controvert the complainant's title. Under these circumstances the complainant assigns, as an error, that the respondents were permitted to urge the How title in defence to the bill, while they, at the same time, held the complainant's deed of the same estate.

Fourth. If said decrees of 7th of June, 1855, and 4th of May, 1858, are not to be treated as judicial determinations, that said contract of March 18, 1845, was in force, then, as appears by the record, the respondents have a deed of the land of the complainant, for which they have not paid, and which they hold in plain violation of a trust, and it was an error in the original case to refuse to dismiss the bill without prejudice upon the return of the mandate from the Supreme Court.

The complainant urges in support of his petition the following considerations: —

FIRST.

Has the complainant selected the proper remedy?

I. This is a simple petition that the decree of rec
Court shall be made right. Being founded upon the record only, it is more like an information than a bill. For the purpose of amending or rectifying its record the Court is always open, forms are not regarded or technicalities considered. A statement of the error, a respectful request that it be corrected, and notice to those to be affected by it, are all that is requisite.

It is not to be treated as a bill of review — for we do not ask that the merits of the old controversy be here opened and the case reviewed — but that an error apparent upon the record should be made right.

Gove *v.* Lyford, 44 N. Hamp. Rep. 525.

II. But even if treated as a bill of review, it is, within the rules of law, a proper remedy for the wrong complained of.

A bill of review is the proper remedy for errors apparent upon the record, whether of law or of fact, and for relief from such errors a bill may be brought as matter of right.

" sixth day of March, 1845, and also a reasonable compensation for any " services rendered after that time by the said complainant in perfect- " ing the title of the Essex Co. thereto; after deducting one hun- " dred and twenty-five dollars then paid said Barker, and all sums " necessarily paid by said the Essex Co., in procuring assignments " of mortgages on the land or otherwise procuring a clear title " thereto, including the sum paid by said company to Robert Farley " for his title under the Hubbard mortgage, and for the title of Jacob " How the assignee of the complainant in his hands with interest," etc., etc., and the case was referred to a Master. Upon the coming in of the Master's report the complainant declined to accept the sum of sixty-eight $\frac{8}{100}$ dollars thereby found due, and thereupon, on the 3d of September, 1855, the Court ordered that the complainant's bill be dismissed against said defendants without costs to either party.

Whereas, The said final decree should, notwithstanding the said complainant's election not to receive said sum of sixty-eight $\frac{8}{100}$ dollars, have been that said defendants pay said sum to the complainant.

Second. By the above decrees it was judicially determined that said contract of the 18th of March, 1845, was valid and binding upon said defendants therein named, and that the complainant had some title in said lands which he had conveyed for the said consideration of twenty-seven thousand dollars.

Whereas, If the complainant did have on the 18th of March, 1845, any title to said lands, the said How (who took, if he ever had anything, *all* the complainant had on the twentieth day of October, 1843, by operation of law) had nothing which could have been conveyed to said company or anybody, and the price by said company for the How title should not have been deducted from the said sum of twenty-seven thousand dollars.

Third. Under the circumstances the respondents should not have been permitted to vouch the How title in their defence. The first deed in their chain of title was the deed of the complainant to their grantors — delivered upon certain conditions not complied with — while they retain this deed and the title it confers, they are estopped to assert its insufficiency arising under the insolvent laws, and exclude it from its place in the foundation of their title. No court had

passed upon or established the How title, nor had any creditors risen to controvert the complainant's title. Under these circumstances the complainant assigns, as an error, that the respondents were permitted to urge the How title in defence to the bill, while they, at the same time, held the complainant's deed of the same estate.

Fourth. If said decrees of 7th of June, 1855, and 4th of May, 1858, are not to be treated as judicial determinations, that said contract of March 18, 1845, was in force, then, as appears by the record, the respondents have a deed of the land of the complainant, for which they have not paid, and which they hold in plain violation of a trust, and it was an error in the original case to refuse to dismiss the bill without prejudice upon the return of the mandate from the Supreme Court.

The complainant urges in support of his petition the following considerations: —

FIRST.

Has the complainant selected the proper remedy?

I. This is a simple petition that the decree of record in the Court shall be made right. Being founded upon the record only, it is more like an information than a bill. For the purpose of amending or rectifying its record the Court is always open, forms are not regarded or technicalities considered. A statement of the error, a respectful request that it be corrected, and notice to those to be affected by it, are all that is requisite.

It is not to be treated as a bill of review — for we do not ask that the merits of the old controversy be here opened and the case reviewed — but that an error apparent upon the record should be made right.

Gove *v.* Lyford, 44 N. Hamp. Rep. 525.

II. But even if treated as a bill of review, it is, within the rules of law, a proper remedy for the wrong complained of.

A bill of review is the proper remedy for errors apparent upon the record, whether of law or of fact, and for relief from such errors a bill may be brought as matter of right.

The law is the same here and in England, the only difference being that in England each fact found by the Court is stated in the decree, and consequently every error is there apparent, which a party may, as of right, and without leave of Court, seek by bill of review to have rectified; while in this country the facts found are not set forth in the decree, and the Court searches the record for such facts in making investigation for errors founded upon them.

Perry *v.* Philip, 17 Ves. 177.
Eliot *v.* Balcom, 11 Gray, 286.
Maury's Heirs *v.* Graham, 3 McLean, 41.
Dexter *v.* Arnold, 5 Mass. 311.
O'Brien *v.* Connor, 2 Ball & Beatty, 154.
McDonald *v.* Dougherty, 39 Ala. 421.
Whiting *v.* Bank of United States, 13 Pet. 14.

If this is to be treated as a bill of review, yet inasmuch as it asks both for specific and general relief, the Court have power to afford either of the two.

1. To alter the old decree and dismiss the bill without prejudice. Or,

2. To grant him such full relief as he is entitled to upon the merits of his case, as disclosed by the record.

Blanchard *v.* Moore, 4 J. J. Marsh, 471.
McNamara *v.* Arthur, 4 Ball & Beatty, 349.
Lyndsay *v.* Lynch, Sch. & Lef. 1.
Corp. of Rochester *v.* Lee, 1 McN. & G. 467.

And the refusal of the complainant to accept the relief offered by the Court does not prejudice his right to the relief he now seeks.

Coleman *v.* Cross, 4 B. Munroe, 268.

SECOND.

Has the complainant been guilty of such laches or neglect as to disqualify his present application? We are warned that the respondents urge the following charges of neglect and omission: —

I. That the complainant, if aggrieved by the order dismissing

his bill absolutely, could have appealed to the Supreme Court and should have done so. We answer,

1. It is true such remedy was open to him, and upon appeal the bill would have been dismissed without prejudice.

Kent *v.* Freeland L. & B. M. Co., 3 Rep. Ch. app. 443.
In re Wiltshire Iron Co. ex parte Pierson, 3 Law R. Ch. app. 443.
Johnson *v.* Fox, I. I. Marsh, 647.

2. In equity, where a right has been lost by mistake or inadvertence, relief is granted if justice demands.

King *v.* Hamlet, 4 Sim. 223.
Corp. of City of Rochester *v.* Lee, 1 McN. & G. 467.
McNamara *v.* Arthur, 1 Ball & B. 349.
Pierson *v.* Robinson, 13 Law Times, N. S. 518.

The complainant does not ask to have a deed set aside for mistake of law, but asks that his proceedings in this Court may be relieved from disabilities arising from such mistake.

3. The effect of a judgment by a "divided Court" upon the existing equities and future remedies of the complainant was not defined, and "counsel learned in the law" might well believe that it was no bar to subsequent suits.

4. The complainant, acting upon the advice of those whose learning is assured by their professional leadership and whose authority is sanctioned by their official relations to the Court, selected remedies which the wisdom of the tribunals to whom he appealed rejected. This is precisely the mistake which invokes aid from the primal functions of a Court of Equity. If he would have found relief upon appeal and has not appealed because misled by the unusual form given to the case by the Court, then when the error is discovered he should be relieved from the consequences of the mistake.

Brokshank *v.* Smith, 2 Y. & C. Rep. 58.
Hough *v.* Richardson, 1 Story Rep. 659.
Cases cit. Story, Eq. I. ns. 1521 a.

If upon appeal he would have been relieved, he should be here and now.

Evans *v.* Clement, 14 Ill. 209.

II. The respondents next say, that the lapse of time bars the complainant's remedy. We understand this objection is presented in two aspects. First, that the length of time alone from the date of the decree complained of, May, 1858, to the filling of this bill, June, 1874, forbids the relief. And second, that the Court of Equity will treat bills of review as within the spirit of the statute, limiting the time for appeals, though not within the letter of the act. To this objection in its several aspects, we reply.

1. The lapse of time in its effects upon rights is of comparative importance only. Its true value, like that of a cipher, is determined by the other figures and its relative position in the problem. Unexplained lapse of time is treated as proof of want of merit, but it is only *proof* subject to be qualified, rebutted or answered by proof of circumstances and facts which deprive it of its force, which explain the inactivity of the complainant.

Buckner *v.* Forker, 7 Dana, 51.
Bond *v.* Hopkins, 1 Sch. & Lef. 418.
Sturgis *v.* Morse, 3 DeGex & Jones, 1.

In this case the complainant has not been inactive. On the contrary, his activity has been sleepless and his energy untiring. Between the years 1858 and 1874 he has conducted an expensive defence to one suit, and prosecuted successively two suits in equity to conclusions, in each of which he was urging the rights now in dispute, and in all of which he was defeated by the force of the decree now complained of. If the complainant allows time to pass while he sees his rights are infringed in silence or inaction, it is proof of want of merit, because it is treated as his own construction of his rights, but such interpretation is inadmissible when he has been diligently at work, though in a mistaken direction. His diligence is proof of his assertion of claim as strong as if made efficiently, and it as effectively neutralizes all effects of lapse of time.

2. The Courts of Equity, in applying to bills of review the limitation which the statute fixes to writs of error and appeals, does so only as a mode of measuring and fixing the disabilities resulting from lapse of time.

The comparison between a remedy by review and a remedy by writ of error or appeal seems to justify the silence of the statute as to the former, and to forbid its application by way of inference. The one is a petition to the Court to re-examine and qualify its own decision, while the others are applications to a higher tribunal to reverse and overrule the judgments of an inferior.

It is true that the Court, in Thomas *v.* Harvie, 10 Wheat. 44, limited bills of review by the statute applicable to writs of error and appeals; but it appears to be not as a fixed rule of law, but as a measure of the effect given to lapse of time. Indeed, the Court seem to admit that a bill of review for newly discovered evidence is within their discretion. The authorities seem to justify bills of review at any time when the Court deem it equitable, the equity being enlightened, not controlled, by the statutes of limitation.

Denistown *v.* Little, 2 Sch. & Lef. 10 n.
Hovenden *v.* Lord Annesly, 2 Sch. & Lef. 607.
Bond *v.* Hopkins, 1 Sch. & Lef. 413.
Lyndsay *v.* Lynch, 2 Sch. & Lef. 1.
Buckner *v.* Forker, 7 Dana, 51.

But this is not a bill of review to which any technical rule can apply, but a petition to the Court to correct an error in its record addressed to that judicial discretion which regards substance and not form.

Patridge *v.* Usborne, 5 Russ. 195.
Eliot *v.* Balcom, 11 Gray, 286.
Pierson *v.* Robinson, 13 Law Times, ns. 518.

If, then, the complainant has employed the appropriate remedy, and has not been guilty of such laches as to bar his petition, we inquire,

THIRD.

Does the record disclose an error that demands or justifies relief? Or, stated in other words, does the record show that the bill should have been dismissed without prejudice?

I. If it appears from the record that some right existed in the complainant that had not been decided or definitively adjudicated in the suit, then the bill should be dismissed without prejudice.

Stott *et als.* *v.* Barkervill, 6 Munf. 20.
NcNeil *v.* Cahill, 2 Bligh. 228.
Woollam *v.* Hearn, 7 Ves. 211–222.
Stevens *v.* Guppy, 3 Russ. 171–185.
Lyndsay *v.* Lynch, 2 Sch. & Lef. 1–12.
Mortlock *v.* Buller, 10 Ves. 292.

II. The record discloses the judicial assertions that the complainant has rights, and that those rights have not been finally passed upon.

1. The Circuit Court passed a decree in his favor.

Upon coming in of the Master's report, the complainant declined to accept the decree, and claimed much more. Thereupon the Court dismissed the bill without costs. This is a judicial determination that he had some right.

2. The Supreme Court, upon full examination and two arguments, could not agree as to those rights.

a. They could not decide that he had none, or

b. They could not decide their value and the mode of relief.

This non adjudication by the Supreme Court is certainly conclusive proof that one half of the members were of opinion the complainant was entitled to some relief.

It seems fair to infer that the other members differed as to the mode of relief, rather than as to the right.

At all events, four of the judges were of opinion he was entitled to have the decree dismissing his bill set aside.

It would be very rank presumption for us to offer argument to prove that an error is manifest upon this record, since both Courts in terms assert and act upon the error.

III. The respondents took the deed of the complainant's property under a certain agreement. That deed they have kept, and it forms an important link in their chain of title. We invoke the great rule of equity, greater in that it is founded upon an elementary principle of justice, that *a grantee of a title cannot retain it and refuse to perform the contract under which it has been acquired.* In this case the grantees refused to complete their conditional contract, and gave notice that they had so elected.

The Court permitted the respondents to charge against the $27,000 agreed to be paid for the complainant's property $12,000 paid by them for the How title, — this was not in the contract of the 18th of March, — "it is not so nominated in the bond," and yet the Court decreed that the money so paid by the Essex Co. for the How title should be paid by Durant.

The error is apparent.

1. How's title rested upon an inchoate right never yet adjudicated and which could be made good only by a judgment of a court of law.

2. Durant was not a party to the contract under which this How title was purchased by the Essex Co. It was a *title,* and not an *encumbrance upon a title.*

3. If How had a title, Durant had none, and yet the Court decreed that his contract of sale was valid and binding.

4. It is vain for the respondents to assert that they do not rely upon Durant's title and do depend upon How's; for

a. How could they establish How's title now by the crucial test of a trial at law?

b. The price agreed to be paid to Durant proves that they intended to buy of him the whole title to the estate.

c. They have never returned the How title, — *i. e.*, never reconveyed to Durant what he conveyed on the 18th of March, 1845.

The decree sustaining the contract of the 18th of March, 1845, and referring the case to the Master to determine what was due thereunder, judicially pronounces that Durant then had an interest in the land which he could sell, and for which he was entitled to receive a consideration.

Now, if such is a fair interpretation of the decree, then it is plain

that the Court found that How had no title at any time, for if he ever had any title, he took all that Durant had, or could convey, on the 29th of March, 1843. It was error, then, to permit the respondents to deduct from the $27,000 the consideration promised Durant, the $12,000 paid to extinguish the How title.

V. If it is true that the vendee of a title under which he is seized cannot retain that title and refuse to perform the contract under which it was obtained but must first surrender,— and cannot set up that the vendor's title is voidable by reason of his fraud upon *others*, and assert a purchase of the true title unless he first surrenders; and that Barker held, and at Durant's request, and for his benefit, conveyed simultaneously with Durant and as part of one bargain a title good as against everybody but Durant's creditors, which title passed to and conferred session on Saunders and the other respondents in turn; and that the deed of Barker was a complete execution of the agreement between Durant and Barker; and that the respondents received, recorded, and retained Durant's deed of this property; and that they have never offered to return the title so conveyed to him.

It was error to permit them to assert the How title and fortify their possession through its grants.

VI. If the Court below, by its several decrees of the 7th of June, 1855, and the 4th of May, 1858, did determine that the contract of March 18, 1845, was valid and in force, then it is plain that the respondents have taken a title to the complainant's land, for which they have paid him nothing, and for which he was entitled by the contract so sustained to receive something. The bill should have been dismissed without prejudice, that he might recover by subsequent action whatever he was justly entitled to under that contract and its following.

E. F. Hodges
for Appt

OFFICE SUPREME COURT U. S.
FILED
MAR 16 1880
D. W. MIDDLETON, Clerk.

BRIEF FOR RESPONDENTS.

SUPREME COURT OF THE UNITED STATES.

No. 208.

ADOLPHUS DURANT, APPELLANT,

vs.

CHARLES S. STORROW, EDWARD S. RAND, THE ESSEX COMPANY, JOHN A. BUTTRICK, JAMES K. FELLOWS, AND CHARLES P. TALBOT, EXECUTORS OF JOHN NESMITH, DECEASED, CALEB SAUNDERS, ADMINISTRATOR OF DANIEL SAUNDERS, DECEASED, AND SAMUEL LAWRENCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

MARCH, 1880.

Supreme Court of the United States.

No. 208.

ADOLPHUS DURANT, COMPLAINANT AND APPELLANT,

vs.

STORROW, RAND, THE ESSEX COMPANY, *et al.*,

DEFENDANTS AND APPELLEES.

BRIEF FOR THE APPELLEES.

This is a petition or motion in a suit which concerns the title to a very large tract of land at Lawrence, Mass., and which was begun Oct. 11, 1847, in the United States Circuit Court at Boston. In 1855–6 it was heard on pleadings and proofs before Judge Sprague, and the bill dismissed. It was brought to this court by appeal, argued, and in the spring of 1858 a mandate went down, ordering that the decree below should stand affirmed. Thereupon the complainant, Durant, moved the Circuit Court that he might have leave to discontinue his bill, or that it might be dismissed without prejudice. May 4, 1858, the court denied this motion, and ordered the mandate to be filed, the decree of dismissal to stand affirmed, and execution to issue in favor of the defendants and against the plaintiff, for the costs. (Record, p. 22.)

No further proceedings were had in the cause until Durant filed the present petition in the Circuit Court on June 29, 1874. In this application he stated summarily the original suit, and some other litigation between the parties concerning the same land, in all of which the decisions had been against him; and alleges that the decrees of the Circuit Court — both that originally made in 1855 and affirmed by the mandate of this court, and that finally entered in obedience to the mandate of this court in 1858 — were wrong. He represents that those decrees are an obstacle to his further litigation, and prays that the case may be reopened, those decrees set aside, and a decree entered dismissing the bill "without prejudice," to the end that he may bring a *new* suit, expressly stating that he

does not mean to try the case on its merits in this same cause (Record, p. 5).

The defendants filed pleas in bar, and a motion to dismiss (p. 26). These defences set out more at length and more correctly the previous proceedings, and insisted (Record, p. 16), —

1. That the final decree of the Circuit Court, entered in 1858, properly followed the mandate of this court; but, if wrong, the error was one which should have been corrected only by an appeal seasonably taken.

2. That the prayer is not for a re-trial on the merits in the Circuit Court, but that the decree may be set aside, and a new one immediately entered of dismissal without prejudice, to the end that a new suit might be brought elsewhere; that, by the Statute of Limitations, a new suit could not be brought (the pretended cause of action being then twenty-nine years old); and so the relief asked for could only initiate vexatious and not fruitful litigation, and therefore should not be considered.

3. That the application was to set aside a decree which, sixteen years before, had closed the litigation; that, during that time, the property had enormously increased in value, and that persons relying upon that decree had made improvements and changed their condition; and so the claim for a re-hearing was stale.

4. That, if any ground for the application ever existed, the time, within which the laws of the United States and the rules of court permitted it to be made, had long since elapsed.

The petition was heard May 17, 1876, by Mr. Justice Clifford and Judge Lowell, on the pleas in bar and the motion to dismiss, and decided for the respondents. No issue was taken on the truth of the pleas; and Sept. 2, 1876, the application was dismissed. From this decree the complainant appeals (Record, p. 27). The opinion of Judge Lowell (p. 27) succinctly states the facts, and declares that the first ground above stated was sustained and sufficient.

A.

It is believed that the precise character of the claims made by the plaintiff Durant in his various suits are not material. They are, however, set forth in the pleadings, and are as follows: —

The land in question is a large tract in the city of Lawrence, and the claim goes back to a period before that city was founded.

In January, 1843, the land was owned by the complainant, but heavily mortgaged to Farley. March 29, 1843, he conveyed to Jesse Sargent. Sept. 11, 1843, Sargent conveyed to Stephen Barker.

March 19, 1845, Barker conveyed to defendants Lawrence, Saunders and Nesmith, by deed recorded March 21, 1845. April 1, 1845, Lawrence, Saunders and Nesmith conveyed to Rand and Storrow, as trustees for the Essex Company. And, shortly afterwards, Rand and Storrow conveyed to the Essex Company, defendant.

In 1846 Farley claimed title adversely to the Essex Company; and thereupon, for the first time, the following facts were brought to the knowledge of the defendants. Oct. 21, 1843, Durant had gone into insolvency under the law of Massachusetts, of which State he was a citizen and resident. His assignee claimed that the conveyance, Durant to Sargent, was in fraud of creditors. This fact was judicially established in the Supreme Court of Massachusetts, and Durant's discharge refused on that ground. The assignee then sold the land in question, and this title, as well as the old mortgage, came to Farley. Litigation began between Farley and the Essex Company; and the Essex Company then bought of Farley the mortgage and the assignee's title, by a deed of Aug. 20, 1846, recorded on the same day.

Oct. 11, 1847, this complainant, Durant, filed his bill in equity in this cause, and asserted in it, that Sargent and Barker held only the bare legal title upon a secret trust for him; that the defendants, Lawrence, Saunders and Nesmith, knew of this; that the bargain respecting the sale was for a price of $27,000, less the amount of the incumbrances; and that the said defendants were not to take the legal title from Barker unless they also purchased the alleged equitable title from the complainant on those terms; that they never did so purchase the equitable title; that the other defendants took with knowledge; and so he asked for a conveyance.

To this the defendants answered: —

1. They all denied that there was any bargain between Barker, Durant, Lawrence *et al.*, which impaired the title to the land.

2. The Essex Company, then owners, said that they bought from Lawrence, Saunders and Nesmith, for value and without notice.

3. That Durant's alleged equitable title was not evidenced by any writing, and was therefore void, both by the Statute of Frauds and by the Massachusetts statute to protect purchasers against secret trusts (Gen. Sts. of Mass. c. 89, §§ 2, 3; c. 100, §§ 19, 20).*

* R. S. of Mass. c. 59, in force in 1845, contains the following :—

Sect. 30. No trust concerning lands, except such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing signed by the party creating or declaring the same, or by his attorney.

Sect. 31. No such trust, whether implied by law or created or declared by the parties, shall defeat the title of a purchaser for a valuable consideration and without notice of the trust.

4. That his alleged title, in favor of which he asked the aid of equity, rested solely on his own attempt to cheat his creditors, and that a court of equity would not aid him to make that attempt fruitful.

5. That, as matter of law, he had no title whatever, but that the only title at the date of the transactions in question was in his assignee in insolvency, or the grantee of that assignee, from whom the Essex Company bought.

6. That the assignee's title was the true title, and that the Essex Company held under it.

7. That Durant's attempt to sell a worthless title was a fraud, which of itself debarred him from all claim to relief.

Judge Sprague held that no case had been made against the land, and dismissed the bill so far as the landowners were concerned. He held that there was a personal agreement between Durant and Lawrence, Saunders and Nesmith, under which the latter were bound to pay $27,000, less the cost of perfecting the title (p. 18). This difference, however, was less than $100; and, upon the refusal of the complainant to accept that relief, the bill was dismissed, Sept. 3, 1855 (p. 20). Then followed an appeal to this court, and a mandate affirming the decree below (p. 21). Upon this the Circuit Court refused the motion of the complainant for leave to discontinue, or that the decree be of dismissal without prejudice, and ordered a dismissal generally. From this decree, made May 4, 1858 (Record, p. 22), no appeal has ever been taken.

On June 16, 1847, the Essex Company brought a writ of entry against Durant for a small parcel of the land in question. The case was tried in November, 1858. The Essex Company relied on the deeds already referred to; and the court at *nisi prius*, and afterwards the full bench, adjudged that the Essex Company had, thereupon, a perfect legal title. And in the opinion (Essex Company *vs.* Durant, 14 Gray, 447) the court held that the Barker deed gave a good title as against Durant, and the Farley deed gave a good title, and that all equitable objections, if he could make them, had been disposed of by the bill in equity in the Circuit Court.

In October, 1861, the complainant filed another bill in equity against the Essex Company in the Supreme Judicial Court of Massachusetts, setting up the same title to the same land. The Essex Company pleaded in bar the above facts, and also the suit in the Circuit Court and the decrees thereon. Durant attempted to avoid the plea by showing that the Supreme Court, on the appeal from the Circuit Court, were divided in opinion, and that the decree made

below was affirmed by a divided court. But the Massachusetts court held the plea good and dismissed the bill, in March, 1864.

Durant *vs.* Essex Co., 8 Allen, 103.

April 26, 1865, he filed a third similar bill in the United States Circuit Court against the Essex Company. The defendant pleaded in bar the above facts, and also the former suits, judgments, and decrees, and also pleaded the twenty-year statute of limitation, because all the wrongs alleged were stated to have been completed and consummated April 1, 1845. The complainant again relied, among other things, on the division of opinion among the judges at Washington. But the Circuit Court (Mr. Justice Clifford and Judge Lowell) held the plea good and dismissed the bill, and, upon appeal, their decision was affirmed, and the mandate went down and was entered in September, 1869; and this court, like the State court, held that the decree dismissing the bill without qualification was, and was intended to be, an adjudication that the complainant should not reopen the litigation (p. 15).

Durant *vs.* Essex Co., 7 Wall. 107.

The present proceeding relates to the same land, sets out the same title, and asserts the same claim.

B.

Briefly stated, the case amounts to this: —

The controversy turns upon facts the last of which arose in April, 1845, and which rest upon proof of alleged oral secret trusts, oral bargainings, and oral proof of notice to affect purchasers for value. In 1847 the complainant brought a bill; and the decree of Judge Sprague on the evidence, affirmed by this court on appeal, followed by a decree in pursuance of the mandate, determined in 1858 both that the complainant had not an equitable title, and that he should not be allowed further to litigate that question. The judgment of the Supreme Judicial Court of Massachusetts determined in 1859 that the defendant, the Essex Company, had a perfect legal title (14 Gray, 447). In 1864 the Supreme Judicial Court of Massachusetts determined that the former decree of the Circuit Court was a bar to further litigation (8 Allen, 103). In 1866 the Circuit Court made the same determination; and that was affirmed by this court, and a final decree entered accordingly in that suit in September, 1869.

The present proceeding was begun June 29, 1875.

The decree of 1858 which is now attacked was, in law and in fact, an adjudication, first, that the complainant was not entitled to relief upon that bill in equity; second, that he should not be allowed to bring any other suit counting on an equitable title. This, otherwise clear, has been settled between these parties by this court in Durant *vs.* Essex Co., 7 Wall. 107, by the Supreme Judicial Court of Massachusetts (Durant *vs.* Essex Co., 8 Allen, 103), and is assumed and stated in the petition (p. 3).

That the Essex Company had a perfect legal title was assumed by his original bill, and determined by the Supreme Judicial Court in Essex Co. *vs.* Durant, 14 Gray, 447.

The petitioner, while impugning the justice of the decree of the Circuit Court of 1858, and imputing ignorance of the law and the facts to the court that pronounced it, does not ask for a re-trial of *this cause;* but wishes the decree to be set aside, and a decree entered which shall in terms allow him to bring a *new suit* elsewhere: this is the precise prayer and the whole scope of his petition (see paragraph praying relief on p. 5).

C.

Allegations in the petition upon a matter wholly immaterial call for the following answer.

The original case involved, among others, two distinct inquiries. One related to the allegations of fraud in obtaining the title, and involved the question whether the Essex Company and their trustees were or were not innocent purchasers; this touched the question of title and affected the Essex Company and their trustees. Another inquiry was to an alleged promise to pay money made by Lawrence, Saunders and Nesmith to Durant, not affecting the passage of the title, but as a consequence of its passage. Upon the first inquiry, Judge Sprague found against the complainant; upon the second inquiry he found in favor of the complainant, thereby affirming that the claim of title, for which payment was to be made, had passed and become vested in the defendants; but it appeared, upon inquiry, that the incumbrances which were to be deducted were, upon the rule adopted by the Circuit Court, only $68.08 less than the price agreed upon: this sum was offered, and, if accepted, the alleged bargain would have been complied with. The complainant refused it (Record, p. 20).

Upon the question of reversal the judges of this court were divided; they thereupon affirmed the decree below and pronounced no opinions. It would be indecorous to inquire and impossible to prove

what were the grounds of dissension, or upon which branch of the inquiry they arose, when no one of the judges thought that the proprieties of their office, or a regard for the rights of the parties, made it needful to state them. The remarks upon this topic on pp. 4, 5, of the petition, therefore, touch matters upon which the petitioner has no knowledge, and which he knows cannot be proved. They are, in the strict legal sense, scandalous attempts to color a case. And the more so because the decision was made before the present senior member of this court took his seat. We assert, however, that there is not the slightest reason to suppose that any judge, before whom this case ever came, ever thought that the defendants' title to the land was successfully attacked or the charges of fraud sustained.

D.

To prevail in his present application in the court below, it was necessary for the petitioner to maintain these propositions, —

1. That it was within the power of the Circuit Court, in 1858, to enter a decree of dismissal, without prejudice, as it was then asked and after argument refused to do.
2. That the rules of equity jurisprudence as applied to the case required such a decree to be then entered.
3. That a petition like the present to the Circuit Court is the proper proceeding to correct the error, if any existed.
4. That the lapse of time and change of circumstances make the relief as proper now as he alleges it would have been the day after that decree was made.
5. That he has been guilty of no delay or laches.
6. That it would be a wise and just exercise of the discretionary power of the court to reopen this litigation.

The court below refused the petition, and to prevail in this appeal he must maintain all these propositions, and also a further one, viz.:

7. That the action of the Circuit Court in refusing it can be revised on appeal.

We submit that the law is against him on every one of these propositions.

Answering them it is obvious, —

I. A decree of dismissal merely and a decree of dismissal "without prejudice," are essentially different decrees. If the court below enters one when it ought to enter the other, this is an error of substance, for

which an appeal will lie, and which this court will correct upon such an appeal or upon motion.

Durant *vs.* Essex Co., 7 Wall. 109.
Gaylord *vs.* Kershaw, 1 Wall. 83.
Barney *vs.* Baltimore, 6 Wall. 289.
Hobson *vs.* McArthur, 16 Pet. 195.
Perkins *vs.* Fourniquet, 14 How. 328.

The decree of 1855 (pp. 19, 20) was of dismissal generally; and when the mandate of 1858 (p. 21) ordered that decree to stand affirmed, the Circuit Court had not the power to vary it as requested. Upon motion of the complainant (Record, p. 22) it expressly passed upon this question, and no attempt to revise that ruling was made from 1858 till 1874.

II. If there was fault or error at the time, it was not in the Circuit Court, which obeyed the mandate, but in this court, which issued it, and upon this topic the answers are,—

(*a.*) Error of this court can only be corrected by a direct and timely application to it, and no such application has been made.

Southard *vs.* Russell, 16 How. 571.
Browder *vs.* McArthur, 7 Wheat. 58.
Wash. Bridge Co. *vs.* Stewart, 3 How. 424.

"There has been an appeal in the former case, and after an appeal no bill of review will lie, either for errors of law apparent on the record, nor for newly discovered evidence, unless the right is reserved in the decree of the Appellate Court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits." (Southard *vs.* Russell, 16 How, 571.)

(*b.*) The necessary, legal, and intended result of a division of opinion here upon an appeal in equity is, that the decision below shall stand affirmed, not merely as a disposition of the particular cause, but as a bar to further litigation.

Durant *vs.* Essex Co., 7 Wall. 107.
Durant *vs.* Essex Co., 8 Allen, 103.

III. The object of the petitioner is to revise the decision made and carried out in 1858, which was that such a decree should be then entered as would bar further litigation. No power now exists to grant an application for this purpose, however or wherever made. It could only be done by an application for a re-hearing, which, by Rule 88, must be made at the same term, or by an appeal or bill of review. Sixteen years have elapsed, and in the United States courts no appeal and no review in any form can be had after five years.

Story's Eq. Pl. §§ 410, 635.
3 Daniels' Ch. Pr. p. 1726; p. 1629 of new ed.
Thomas *vs.* Harvie's Heirs, 10 Wheat. 146.
Whitney *vs.* Bank of United States, 13 Pet. 15.
Indianapolis R. R. Co. *vs.* Horst, 93 U. S. p. 301.

He cannot reopen the case under this anomalous petition, because he cannot do it in any manner or any form known to the law; and, as has been said with regard to writs of error, "common justice requires that what a plaintiff cannot do directly in the mode pointed out by law, he shall not be permitted to do collaterally by evasion." (Voorhies *vs.* Bank of United States, 10 Pet. 472.)

There was a re-hearing upon the original appeal in this court in 1857 (Record, p. 2), and there cannot be another.

IV. If the power existed, no case is made which at any time would have authorized the relief sought.

No second appeal would lie to revise the matter of the mandate.

The Lady Pike, 96 U. S., 461.

No ground appears for a bill of review, because it is not alleged that any facts have been discovered which were not previously before the court, or which tend to show that the decree was wrong, and a bill of review can rest upon no other ground.

3 Daniel, ch. 1734.
Story's Eq. Pl. §§ 412, 413, 420, 634.
Le Guen *vs.* Gouverneur, 1 Johns. Cases, 503.
Jenkins *vs.* Eldredge, 3 Story, 314.
Dexter *vs.* Arnold, 5 Mason, 308, 316, 317, 320.
Livingston *vs.* Hobbs, 3 Johns. ch. 127.

The expressed and only allegation in the petition of ground for relief is, error of the court in law and in fact, upon the proof before them (p. 4, at bottom).

At most, this, if true, might be ground for a re-hearing, the time for which has long gone by.

V. The request made is, in terms, that the Circuit Court will reverse a part of the decree, and do now what it refused to do in May, 1858; viz., allow a new suit to be brought to re-try the case. If the court had now the legal power to do it, and if in 1858 it would have been proper to do it, it would not now permit it.

(*a.*) The alleged cause of action arose in 1845, and all facts relating to it were as well known then as now; a new suit would, therefore, necessarily be barred by the Statute of Limitations, and by the lapse of nearly thirty years, and so the court should not attempt to authorize one.

Badger *vs.* Badger, 2 Wall. 87.
Elmendorf *vs.* Taylor, 10 Wheat. 168.
Carrol *vs.* Greene, 92 U. S. 509.

(*b.*) No court will permit the re-trial of questions of fact resting on oral testimony, after thirty-five years.

(*c.*) This application was first made when the decree had stood sixteen years. It had become a title, on the faith of which the changes stated on p. 16 of the Record have taken place. The real estate, which was almost wild country in 1845, is now a part of a rapidly growing city.

Clegg *vs.* Edmonson, 8 De G. M. & G. 810.
Badger *vs.* Badger, 2 Wall. 87.
Dexter *vs.* Arnold, 5 Mason, 315, 321.
Sullivan *vs.* Portland R. R. Co. 94 U. S. 811.
Harwood *vs.* R. R. Co. 17 Wall. 78.

(*d.*) The plaintiff's deliberate delay is fatal to him. He asserts, indeed, that he did not appeal because he was advised that the decree was not a bar to further litigation; but this, if true, could never excuse sixteen years' delay, nor remove the statute bar of five years to all attempts to review the adjudication. But this case shows a state of facts altogether extraordinary.

The final decree objected to was entered May 4, 1858 (Record, p. 2). His counsel then, perfectly appreciating its effect, asked for exactly the same relief now sought for (p. 22); upon its refusal, he (if his story be correct) chose to take his chance on a question of law, as to its effect, rather than take an appeal to change it. He then waited three years and a half, and, October, 1861, filed a bill in the State

court (p. 14). To this the Essex Company pleaded said decree in bar: being thus warned, though the time for appeal had not run, he took no steps in that direction. In 1864, the Supreme Court of Massachusetts decided that the plea was good. Instead of then applying for relief, he waited another year, and then filed another bill on the merits in the Circuit Court, in April, 1865. To this the same plea was interposed and found good by the Circuit Court in 1866. This decision was sustained, on appeal, by this court, in the spring of 1869 (p. 15), and the court considered the case so clear at the argument that the respondents' counsel were not called upon. The complainant slept on this for five years more before he saw fit to move.

Hendrickson vs. Hinckley, 17 How. 446.

VI. If the Circuit Court had any power to grant this application, it could only be by treating it as an application for a re-hearing of the precise question passed upon by Judge Sprague, May 4, 1858. From its refusal so to do no appeal lies.

Wylie *vs.* Coxe, 14 How. 1.
Indianapolis R. R. Co. *vs.* Horst, 93 U. S. 301.
Roemer *vs.* Simon, 91 U. S. 149.

VII. Several of the parties against whom relief is sought died long ago. The estates certainly of some, and presumably of all, have been distributed, and the Massachusetts statute runs in favor of their executors, who are made defendants (p. 17).

Respectfully submitted by

JAMES J. STORROW,
For Appellees.

BOSTON, February, 1880.

DURANT *vs.* ESSEX CO.

[7 Wall. 109, Oct. T. 1868.]

Mr. Justice FIELD delivered the opinion of the court.

The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequte remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits.*

Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. The omission of the qualification in a proper case will be corrected by this court on appeal.†

In the case in the Circuit Court we are not left to conjectures, or to presumptions, as to what was intended by the decree. The plea of the defendants avers, that testimony was taken on both sides, and that the case was heard on its merits, and argued by counsel. And when the mandate of this court was filed, the complainant moved for leave to discontinue the suit, or that the bill be dismissed without prejudice; but the motion was denied and the decree was affirmed.

There is nothing in the fact that the judges of this court were divided in opinion upon the question whether the decree should be reversed or not, and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; but the reason is no part of the judgment itself.

* Walden *v.* Bodley, 14 Peters, 156; Hughes *v.* United States, 4 Wallace, 237; Bigelow *v.* Winsor, 1 Gray, 301; Foote *v.* Gibbs, Ibid, 412.

† Lindsay *v.* Lynch, 2 Schoales & Lefroy, 16; Woollam *v.* Hearn, 7 Vesey, 222; Stevens *v.* Guppy, 3 Russell, 185; Sewall *v.* Eastern R. R. Co., 9 Cushing, 13; Miles *v.* Caldwell, 2 Wallace, 45; Carneal *v.* Banks, 10 Wheaton, 192; Dandridge *v.* Washington, 2 Peters, 378; Piersoll *v.* Elliott, 6 Id. 100; Gaylords *v.* Kelshaw, 1 Wallace, 83; Barney *v.* Baltimore, 6 Id. 289; Hobson *v.* McArthur, 16 Peters, 195.

It has long been the doctrine in this country and in England, where courts consist of several members, that no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made. If affirmative action is necessary for the further progress of the cause, the division operates as a stay of proceedings. If the affirmative action sought is to set aside or modify an existing judgment or order, the division operates as a denial of the application, and the judgment, or order, stands in full force, to be carried into effect by the ordinary means.

Thus, in *Iveson* v. *Moore*,* a verdict was rendered for the plaintiff, and according to the practice prevailing in the English courts, a rule was entered for judgment *nisi*. Afterwards a rule was obtained that the judgment should be arrested *nisi* — that is, unless cause be shown against the arrest. On motion to discharge this latter rule the judges were equally divided, and no order could be made. But the court said, if "it had been divided on the first motion [that is, the motion against the judgment under the general rule], the plaintiff might have entered judgment; but now this rule [in arrest] must stand or be discharged, and discharged it cannot be, for the court is equally divided." The inability of the court, from the division, to take affirmative action, would have allowed the plaintiff to enter his judgment under the general rule if no order in arrest has been made; but that being made, the position of the parties was changed.

In *Chapman* v. *Lamphire*,† the plaintiff obtained a verdict, upon which the usual rule was entered for judgment *nisi*, in accordance with the established practice. A motion was then made for the arrest of the judgment, and it is reported that "the judges were divided in opinion, two against two, and so the plaintiff had his judgment, there being no rule made to stay it, so that he had his judgment upon his general rule for judgment; but if it had been upon a demurrer or special verdict, then it would have been adjourned to the Exchequer Chamber."

By a law of England, passed as long ago as 14 Edward III, if the judges of the King's Bench, or Common Pleas, are equally divided, the case is to be adjourned to the Exchequer Chamber, and be there argued before all the justices of England. If these are equally divided, it is to be determined at the next parliament by a prelate, two earls, and two barons, with the advice of the lords chancellor, and treasurer, the judges, and other of the king's council.‡

* 1 Salkeld, 15; S. C., 1 Lord Raymond, 495.

† 3 Modern, 155.

‡ Comyn's Digest, title Court, D. 5; Coke Litt. 71, 2.

In the case of the special verdict, affirmative action would be required to enter judgment, which would be impossible from the division of the judges. But in the case of the demurrer, the effect of a division would depend, we think, upon the rules of practice established in such cases, for in the absence of a settled practice or general rule of court upon the subject, the judges disagreeing as to the demurrer might disagree also as to the effect of their inability to decide it, as was the fact in this court in the case between the commonwealth of Virginia and West Virginia, argued upon demurrer to the bill at the last term.

In cases of appeal or writ of error in this court, the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment, or decree be reversed? If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.

The Antelope,* and *Etting* v. *The Bank of the United States*,† are cases where the decisions of the court below, or some part of them, were affirmed upon a division of the judges, and a term seldom passes in which there are not several cases disposed of in this way. In *Brown* v. *Aspden*,‡ Chief Justice Taney observed that there was no difference between a decree in chancery and a judgment at law as to its affirmance on a division of the court. "In both cases," he said, "the motion is to reverse, and if that fails, the judgment, or decree, necessarily stands."

It is also the practice of the Exchequer Chamber in England to affirm the judgment of the court below, brought before it on a writ of error, when the judges are equally divided. Where a case is adjourned to that court, under the statute of 14 Edward III, upon a division of the judges of the court below, the practice, as we have stated, is different. But on writs of error it is similar to that followed by this court. Such, also, is the practice of the House of Lords when sitting as a court of appeals. It is said that this practice depends upon the manner in which the Lords put the question,

* 10 Wheaton, 66. † 11 Id. 59. ‡ 14 Howard, 28.

which is always in this form: Shall this judgment, or decree, be reversed? But that is the question in all appellate courts, and the particular manner in which the question is stated, cannot change the rule of law on the subject.*

The statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character. But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.

JUDGMENT AFFIRMED.

* See Bridge *v.* Johnson, 5 Wendell, 372.